Supreme Court

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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GRAND LOCKWOOD PARTNERS LIMITED PARTNERSHIP,
Petitioner,

v.

MAXWELL HOUSE COFFEE COMPANY,
KRAFT GENERAL FOODS, INC.,
VISTA CHEMICAL COMPANY, ENTERPLAST, INC.,
AND H. MUEHLSTEIN & CO., INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. May a party who fails to file a notice of appeal benefit from a reversal upon remand of the case?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit include:

1. Petitioner, Grand Lockwood Partners Limited Partnership, appellee;
2. Maxwell House Coffee Company, appellant and appellee;
3. Kraft General Foods, Inc., appellant and appellee;
4. Vista Chemical Company, appellee only;
5. Enterplast, Inc., appellant; and
6. H. Muehlstein & Co., Inc., appellant.

Grand Lockwood Partners Limited Partnership is not a corporation, and therefore, it has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Grand Lockwood Partners Limited Partnership, respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit in addition to the denial of Grand Lockwood's Petition for Panel Rehearing and Motion for Clarification of Opinion.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 115 F.3d 282 (5th Cir. 1997) and 1997 U.S. App. LEXIS 13055 (June 4, 1997) and is reproduced in the separately bound Appendix to this petition ("App.") at 1a. The unreported opinions denying Grand Lockwood's Petition for Panel Rehearing and denying Grand Lockwood's Motion for Clarification of Opinion are reproduced at App. 16a and 18a. The district court's unreported Final Judgment is reproduced at App. 20a. The district court's Memorandum Opinion and Order, the Special Master's Report and Recommendation, and the Errata Sheet Supplementing the Special Master's Report and Recommendation—all of which are unpublished and all of which are incorporated in the district court's final judgment—are reproduced at App. 23a, 32a and 81a, respectively.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its opinion on June 4, 1997, and on July 7, 1997, denied Grand Lockwood's Petition for Panel Rehearing and Motion for Clarification of Opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent Federal Rules of Appellate Procedure at issue in this petition are Rules 3, 4(a) and 26(b), and are set forth below:

Rule 3. Appeal as of Right — How Taken

(a) Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4.... Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal....

(b) Joint or Consolidated Appeals. If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal. A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." ... A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for

failure to name a party whose intent to appeal is otherwise clear from the notice. . . .

. . .

(e) Payment of Fees. Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. . . .

(2) A notice of appeal filed after the court announces a decision or order but before the entry of the judgment or order is treated as filed on the date of and after the entry.

(3) If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion

outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59;

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or any part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be *ex parte* unless the court otherwise requires. Notice of any such motion which is filed after expiration of

the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

Rule 26. Computation and Extension of Time

(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

STATEMENT OF THE CASE

This application arises from an interpleader action filed pursuant to 28 U.S.C. § 1335 and presents the sole issue of whether parties who fail to meet the jurisdictional notice of appeal requirements in rules 3, 4 and 26(b) of the Federal Rules of Appellate Procedure are entitled to receive the benefits of an appellate reversal upon remand. The Fifth Circuit in this case, and some other courts of appeals, continue to act in conflict with this Court's rulings in *Torres v. Oakland Scavenger Company,* 487 U.S. 312, 315-16 (1988) (holding a timely filed notice of appeal is mandatory and jurisdictional to appellate review) and *Morley Construction Company v. Maryland Casualty Company,* 300 U.S. 185, 191 (1937) (ruling that, absent a timely notice of appeal, an appellee may not attack the judgment below to enlarge his own rights or diminish his adversary's rights). These courts treat notices of appeal as rules of practice, not jurisdictional prerequisites to participate in an appeal. The facts underlying this application give the Court a timely opportunity to resolve this split of authority, not only between this Court's precedents and those of the courts of appeals, but also between and within the federal circuits.

This case presents the question of whether parties in two circumstances who fail to file a notice of appeal can benefit from the appeal: (1) parties who take no action in the appellate court; and (2) a party who tries to piggy-back itself onto another party's proper appeal by filing an appellee's brief on one issue and adopting the other party's brief on a separate issue. Litigants look to notices of appeal to determine the extent of the finality of the judgment. Through this case, this Court may promote judicial policies favoring the finality of judgment.

A. Course of Proceedings and Disposition in the District Court.

After a fire destroyed a warehouse and the goods stored within, the insurer of the warehouse and certain contents filed this interpleader action to resolve conflicting claims for insurance

proceeds. (Appellants' Record Excerpts, Tab 2, 2091.)[1] Petitioner, Grand Lockwood Partners Limited Partnership was named as a defendant because it had incurred clean-up and debris removal expenses resulting from the fire. The district court found Grand Lockwood and seven other parties entitled to recover under the insurance policy and awarded Grand Lockwood a proportionate share of the interpleaded funds. (Tab 5, 2215-14; Tab 2, 2051; Tab 6, 2371-70.) The court found that several other entities, including Enterplast, Inc. and H. Muehlstein & Co., Inc. were not entitled to any of the interpleaded funds. (Tab 5, 2215-14; Tab 2, 2056-52.) Other parties, including Maxwell House Coffee Company and Kraft General Foods, Inc. (jointly "Kraft") received less money than the amount to which they thought they were entitled.

B. Course of Proceedings and Disposition in the Appellate Court.

Kraft filed a notice of appeal in the United States Court of Appeals for the Fifth Circuit, complaining of the award to Grand Lockwood and seeking for themselves a higher award from the proportion awarded Grand Lockwood. (Tab 7, 2378-75; Brief of Appellants Maxwell House Coffee Company and Kraft General Foods, Inc. for the Account of Their Deductible Uninsured Interest.) The Kraft parties appealed only on behalf of themselves. Enterplast and Muehlstein filed cross-notices of appeal, challenging only the trial court's refusal to award them interpleaded funds and omitting any claim to the Grand Lockwood funds. (Tab 8, 2382-80; Brief of Intervenor-Defendant-Appellant Enterplast, Inc.; Tab 9, 2384-83; Brief of Intervenor Defendant-Appellant H. Muehlstein & Co., Inc.) No other party filed a notice of appeal challenging the district court's judgment for Grand Lockwood.

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[1] Grand Lockwood cites to the Record Excerpts of Appellants Enterplast, Muehlstein and Kraft, filed in the Court of Appeals for the Fifth Circuit.

Months after the filing deadline expired, Vista Chemical Company, without a notice of appeal, filed an appellee's brief arguing in support of the district court's ruling against Enterplast and Muehlstein and attempting to adopt by reference Kraft's appellate brief. (Brief of Defendant/Appellee Vista (hereinafter "Vista Brief") at 5-6.)

Ultimately, the court of appeals affirmed the judgment refusing funds to Muehlstein and Enterplast, but reversed the judgment awarding funds to Grand Lockwood. (App. 15a.) It remanded the case to the district court for a recalculation and redistribution of the interpleaded funds. (*Id.*)

Grand Lockwood filed a Petition for Panel Rehearing and Motion for Clarification of Opinion. In it, Grand Lockwood requested that the court of appeals clarify its opinion to provide that only parties who timely filed a notice of appeal are entitled to additional funds upon remand, pursuant to rules 3, 4, and 26(b) of the Federal Rules of Appellate Procedure and pursuant to *Torres v. Oakland Scavenger Company,* 487 U.S. 312 (1988). Vista, on the other hand, maintained that "all parties" to the district court's judgment "became parties to the appeal" once Kraft invoked the Fifth Circuit's jurisdiction. (See Vista Chemical Company's Reply to Grand Lockwood Partners Limited Partnership's Petition for Panel Rehearing and Motion for Clarification of Opinion at 2.) Vista argued that under the court's opinion, with the exception of Grand Lockwood, all parties who the trial court determined to be entitled to interpleaded funds should share proportionately in the funds originally awarded to Grand Lockwood. (*Id.* at 4.) On July 7, 1997, the court of appeals denied Grand Lockwood's petition and motion for clarification without opinion. (App. 17a, 19a.)

REASONS FOR GRANTING THE PETITION

Despite the plain language and history of rules 3, 4, and 26(b) of the Federal Rules of Appellate Procedure and counter to this Court's precedents, the courts of appeals remain divided on the issue of whether a timely filed notice of appeal is a jurisdictional threshold or merely a rule of practice that may be circumvented in certain circumstances. The split of authority on this issue, both among and within the circuits, is pervasive. It fosters inequity by allowing non-appealing parties to benefit, without risk, from another party's appeal. It undermines judicial economy and the plain language of the appellate rules. Most importantly, it frustrates the public policy favoring the finality of judgments.

This case presents a timely opportunity to resolve the issue of whether a party must satisfy rule 3, 4 and 26(b) requirements to benefit from an appellate reversal. To Grand Lockwood's detriment, this error of allowing Vista and other parties who did not file notices of appeal to benefit from the reversal potentially bestows windfalls to the non-appealing parties, contrary to *Torres v. Oakland Scavenger Company,* 487 U.S. 312, 315-16 (1988) (ruling a timely filed notice of appeal is mandatory and jurisdictional to appellate review). This error permits appellee Vista, without filing a notice of appeal, to impermissibly attack the judgment below, thereby enlarging its own rights and diminishing Grand Lockwood's rights, contrary to *Morley Construction Company v. Maryland Casualty Company,* 300 U.S. 185, 191 (1937).

The parties below exercised their rights as litigants during their first opportunity in court. If aggrieved, they were entitled to perfect their appeal in a timely fashion. Absent an appeal, however, they conceded to the judgment. Were it otherwise, there would be no finality of judgment.

I. The court of appeals' refusal to limit its remand exacerbated the wide split of authority among and within the circuits.

The Fifth Circuit's denial of Grand Lockwood's Petition for Panel Rehearing and Motion for Clarification of Opinion only

compounds the confusion upon existing conflicts between precedents of this Court and the courts of appeals, as well as upon conflicts among and within the federal circuits. Since 1937, this Court has consistently written that a notice of appeal is a prerequisite to attack a lower court's judgment. This proposition is implicit in the appellate rules. And yet, contrary to the rules and precedent, courts continue to extend appellate jurisdiction to parties who fail to file a notice of appeal. The Fifth Circuit's refusal to clarify its opinion relegates Grand Lockwood to the trial court to be subjected to meritless legal theories that cannot be resolved consistently with this Court's precedent and the appellate rules.

A. Embodied in the Federal Rules of Appellate Procedure, *Morley Construction Company v. Maryland Casualty Company* requires a notice of appeal to invoke appellate jurisdiction.

The requirement to file a notice of appeal in order to invoke the appellate court's jurisdiction, and thus to become entitled to appellate benefits upon remand, stems back to early 1937. It was then that this Court addressed the issue of an appellate court's power to modify a decree for the benefit of an appellee in the absence of a cross-appeal. *Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 187 (1937). In the absence of a cross-appeal, the Court wrote, an appellee cannot " 'attack the decree with a view either to enlarge his own rights thereunder or of lessening the rights of his adversary.' " *Id.* (quoting *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924)). The Court reasoned that a court of appeals lacks "power" (or jurisdiction) to modify the judgment in the absence of a cross-appeal, creating the "inveterate and certain" rule that a notice of appeal is jurisdictional to appellate review and benefits. *Morley*, 300 U.S. at 191.

Morley's mandate is embodied in the structural framework of the rules concerning perfection of appeal, rules 3, 4 and 26(b). FED. R. APP. P. 3, 4, 26(b). Rule 3 provides that an appeal *"must*

be taken by filing a notice of appeal" within the time specified in rule 4 and that the "failure of an appellant to take any step *other than the timely filing of a notice of appeal* does not affect the validity of the appeal." FED. R. APP. P. 3 (emphasis added). Under rule 4, an initial notice of appeal must be filed within thirty days of the judgment. FED. R. APP. P. 4(a)(1). When one party appeals in a timely fashion, rule 4 provides an additional fourteen days for other parties to file a notice of appeal. FED. R. APP. P. 4(a)(3). Rule 26(b) prohibits courts from enlarging the notice of appeal filing deadline. FED. R. APP. P. 26(b). These rules restate the proposition established in *Morley*: Absent a timely notice of appeal, a party fails to cross the appellate court's jurisdictional threshold and forever closes the doorway to attack the trial court's judgment or to benefit from an appeal. *Morley,* 300 U.S. at 191; *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315-16 (1988).

B. Courts remain divided on the issue of whether a notice of appeal is required to benefit from an appellate reversal.

This Court has consistently applied *Morley* in refusing to consider issues raised by parties who did not file cross-appeals where the issue, if sustained, would modify the judgment adversely against the petitioner. *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226 n.2 (1975); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970). Likewise, this Court has consistently held that a notice of appeal is a jurisdictional requirement for appellate review and that failure to file a notice of appeal renders a trial court's judgment final against the non-appealing party. *See, e.g., Torres*, 487 U.S. at 315-18.

Yet, the courts of appeals remain divided on the issue of whether one party's appeal may confer jurisdiction sufficient to permit other parties to attack the judgment below or to benefit from an appellate reversal upon remand. Some cases hold that a cross-appeal or separate appeal is a jurisdictional prerequisite to any party's attack on the trial court's judgment. *EF Operating*

Corp. v. American Bldgs., 993 F.2d 1046, 1049 & n.1 (3d Cir.), *cert. denied*, 510 U.S. 868 (1993); *Francis v. Clark Equip. Co.*, 993 F.2d 545, 552-53 (6th Cir. 1993); *New Castle County v. Hartford Acc. & Indem. Co.*, 933 F.2d 1162, 1206 (3d Cir. 1991); *Rollins v. Metropolitan Life Ins. Co.*, 912 F.2d 911, 917 (7th Cir. 1990); *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408, 1415-17 (7th Cir. 1989); *Brotherhood of Maintenance of Way Employees v. St. Johnsbury & Lamoille County R.R./M.P.S. Assocs.*, 806 F.2d 14, 15-16 (2d Cir. 1986); *Benson v. Armontrout*, 767 F.2d 454, 455 (8th Cir. 1985); *Savage v. Cache Valley Dairy Ass'n*, 737 F.2d 887, 888-89 (10th Cir. 1984); *S.E.C. v. Youmans*, 729 F.2d 413, 415 (6th Cir.), *cert. denied*, 469 U.S. 1034 (1984); *Martin v. Hamil*, 608 F.2d 725, 730-31 (7th Cir. 1979); *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 725-26 (2d Cir. 1978); *Gomez v. Wilson*, 477 F.2d 411, 414 n.10 (D.C. Cir. 1973).

Conversely, other circuit court cases hold that a separate or cross-appeal is not jurisdictional, but a mere "rule of practice" which may occasionally be bypassed. *United States v. Tabor Court Realty Corp.*, 943 F.2d 335, 342-45 (3d Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 32-33 (D.C. Cir.), *cert. denied*, 498 U.S. 980 (1990); *LaFaut v. Smith*, 834 F.2d 389, 394 n.9 (4th Cir. 1987); *Freeman v. B&B Assocs.*, 790 F.2d 145, 151 (D.C. Cir. 1986); *Anthony v. Petroleum Helicopters, Inc.*, 693 F.2d 495, 497-98 (5th Cir. 1982); *Bryant v. Technical Research Co.*, 654 F.2d 1337, 1341-42 (9th Cir. 1981); *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 476 (8th Cir. 1977).

Torres v. Oakland Scavenger Company, 487 U.S. 312 (1988) should have been the deathknell of the "rule of practice" approach. In *Torres*, this Court held that rules 3 and 4 of the Federal Rules of Appellate Procedure combine to create a "single jurisdictional threshold" to appellate review. *Torres*, 487 U.S. at 315; *see supra* Section IA. In light of *Torres*, some circuits have disavowed the rule of practice theory. *See, e.g., Young Radiator*

Co., 881 F.2d at 1415-17 (holding rules 3 and 4 must be satisfied by each party). Yet, some circuits continue to apply the rule of practice theory. *E.g., Tabor Court Realty Corp.*, 943 F.2d at 342-45; *Spann*, 899 F.2d at 32-33; *Freeman*, 790 F.2d at 151. In fact, some circuits have published conflicting opinions within the circuit on the issue. *Compare EF Operating Corp.*, 993 F.2d at 1049 & n.1 *with Tabor Court Realty Corp.*, 943 F.2d at 342-45.

Until recently, post-*Torres* dicta suggested that the Fifth Circuit believed the rule of practice theory was no longer good law. *Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1289 (5th Cir. 1992) (noting in dicta that *Anthony v. Petroleum Helicopters, Inc.*, 693 F.2d 495, 497-98 (5th Cir. 1982), which held that an appellate court has discretion to retain jurisdiction over non-appealing parties, might not be viable in light of *Torres*); *accord, Stockstill v. Petty Ray Geophysical*, 888 F.2d 1493, 1497 (5th Cir. 1989).

In *Marts v. Hines,* 1997 U.S. App. LEXIS 17944 (5th Cir. July 18, 1997), the Fifth Circuit, sitting *en banc,* modified a district court's dismissal without prejudice to a dismissal with prejudice, although Marts, a *pro se* plaintiff, was the sole appellant. *Marts v. Hines,* 1997 U.S. App. LEXIS 17944, at *2, *5-*7 (5th Cir. July 18, 1997). Eight justices dissented on the ground the court's action violates *Morley, Torres,* and rules 3, 4, and 26(b). *Id.,* at *6-*52 (Garwood, J., King, J., Higginbotham, J., Smith, J., Duhè, J., Garza, J., Benavides, J., and Dennis, J., dissenting). The *Marts* dissent highlights a sixty-year struggle among the circuits over the issue presented in Grand Lockwood's petition. The Court should grant certiorari to resolve the issue.

C. The rule of practice theory is erroneous.

The rule of practice theory simply cannot be reconciled with the appellate rules and this Court's precedents. For example, some courts attempt to justify the rule of practice theory by arguing the initial notice of appeal invokes jurisdiction over the "whole case." *Tabor Court Realty Corp.,* 943 F.2d at 344;

LaFaut, 834 F.2d at 394 n.9; *Freeman,* 790 F.2d at 151; *Hysell,* 559 F.2d at 476. This rationale renders rule 4 meaningless. If an initial appeal invokes jurisdiction over the entire case, parties would not need the additional fourteen days rule 4 provides for filing additional notices of appeal. Furthermore, *Torres* inherently rejected the "whole case" rationale. As the Seventh Circuit noted:

> [I]t could have been argued in *Torres* that the notice of appeal naming fifteen of the sixteen plaintiffs invoked the jurisdiction of the court over the whole case, so that a separate appeal by the sixteenth plaintiff would not be jurisdictionally required. Yet the Court's holding made clear that the requirements of Rules 3 and 4 must be satisfied as to each party, and precludes the argument in this case that Celotex's noncompliance with Rule 4(a)(3) can be waived.

Young Radiator Co., 881 F.2d at 1416. Thus, the "whole case" rationale has been intrinsically overruled by this Court.

Some courts also trace support for the rule of practice theory to *Lagnes v. Green,* 282 U.S. 531 (1931). *E.g., Tabor Court Realty Corp.,* 943 F.2d at 342. Their reliance, however, is flawed. The rule of practice language in *Lagnes* is mere dicta because the respondent in that case attempted to sustain, rather than to attack, the lower court's decree. *Lagnes,* 282 U.S. at 538 (citing *United States v. American Ry. Express Co.,* 265 U.S. 425, 435 (1924)). In addition, *Lagnes* predates *Morley,* and therefore, to the extent the two conflict, *Morley* is controlling.

The rule of practice theory is wrong. Because of it, litigants like Grand Lockwood remain plagued by inconsistent application of the theory, even within particular circuits. The Court should grant certiorari to resolve these conflicts and to restore equity to appellate procedure.

II. This case presents an opportunity to resolve the jurisdictional notice of appeal requirement as applied both to parties who neither appealed nor appeared before an appellate court and to parties who appeared as appellees without filing a separate or cross-appeal.

Certain parties in this case argue that every successful party in the trial court is entitled to benefit from Kraft's appeal by receiving additional redistributed funds upon remand. (See Vista Chemical Company's Reply to Grand Lockwood Partners Limited Partnership's Petition for Panel Rehearing and Motion for Clarification of Opinion.) The non-appealing parties in this case may be divided into two categories. Most parties are within the first category—those who accepted the trial court's judgment and did not file a notice of appeal or appear as appellees before the Fifth Circuit. The second category includes only Vista, who appeared as an appellee but failed to file a notice of appeal.

Granting certiorari on the sole issue of whether a party must satisfy the requirements of rules 3, 4, and 26(b) before receiving appellate benefits enables the Court to dispel all conflicting authority regarding both categories of parties. *See, e.g., Tabor Court Realty Corp.*, 943 F.2d at 342-45 (opining that the "lack of a formal cross-appeal will not always determine a court's ability to consider certain issues that are raised by parties to the appeal but also pertain to parties who are not formally participating in the appeal").

Grand Lockwood submits that neither category is entitled to benefit from a reversal of the judgment for Grand Lockwood because neither category crossed the appellate jurisdictional threshold. FED. R. APP. P. 3, 4, 26(b); *Torres,* 487 U.S. at 315-18. Vista, who merely appeared as an appellee before the Fifth Circuit, has no more right to appellate benefits upon remand than the parties who neither appealed nor appeared as appellees. *Morley,* 300 U.S. at 187-91; *Torres,* 487 U.S. at 315-18.

III. Resolving this issue protects the finality of judgments.

Left unresolved, the practice of permitting non-appealing parties to attack the judgment and to benefit from an appeal damages both litigants and well-settled judicial policies. Appellants are left to bear all appellate costs, only to bestow unearned benefits to non-appealing parties. Conversely, parties who are successful in trial cannot rely on notices of appeal to determine the finality of the judgment as to non-appealing parties. The notice of appeal exists, in part, to give such successful litigants fair notice of the parties appealing the judgment. *Torres,* 487 U.S. at 318. When courts exercise jurisdiction over non-appealing parties "the appellee and the court [are] unable to determine with certitude whether a losing party not named ... should be bound by an adverse judgment." *Id.* Thus, policies favoring the finality of judgments are thwarted when litigants cannot rely upon notices of appeal as indications of the extent to which a judgment is final.

Finality and repose are essential to our judicial system. *Cardinal Chem. Co. v. Morton Int'l, Inc.,* 508 U.S. 83, 100 (1993); *see also Lawrence ex rel. Lawrence v. Chater,* 116 S. Ct. 604, 610 (1996). Finality not only protects successful parties from oppressive litigation, but also preserves scarce judicial resources. *See Montana v. United States,* 440 U.S. 147, 153 (1979). Consequently, parties should be required to litigate effectively in their first opportunity in court, rather than be permitted to delay another's access to the courts.

Yet, in this case, parties who chose not to invoke the appellate court's jurisdiction, and thereby conceded the district court's judgment, now seek appellate benefits upon remand. Unless the Court corrects this error, Grand Lockwood is denied the finality of judgment guaranteed by the rules of procedure. Without having the notice and an opportunity to respond, provided by notices of appeal, Grand Lockwood is forced to relitigate issues already decided.

No maxims are more firmly established than those preventing repeated litigation: *"interest rei publicoe, ut sit finis litium,* and *nemo debet bis vexari pro una et eadam causa,"* meaning it concerns the public that litigation be ended, and no one should be vexed twice for the same cause. *United States v. Throckmorton,* 98 U.S. 61, 65 (1878). By clarifying that a party may not benefit from an appellate reversal without filing a timely notice of appeal, this Court may provide litigants with access to the finality of judgments guaranteed by the rules of procedure.

To protect the finality of judgments and restore certainty to appellate procedure, this Court should grant certiorari. To reinstate the purpose, meaning and equitable intent of the Federal Rules of Appellate Procedure, this Court should rule that each party seeking to attack the trial court's judgment or to benefit from an appellate reversal must first invoke the jurisdiction of the appellate court by filing a timely notice of appeal.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No. 96- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

GRAND LOCKWOOD PARTNERS LIMITED PARTNERSHIP,
Petitioner,

v.

MAXWELL HOUSE COFFEE COMPANY,
KRAFT GENERAL FOODS, INC.,
VISTA CHEMICAL COMPANY, ENTERPLAST, INC.,
AND H. MUEHLSTEIN & CO., INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 96-20441

MARINE INDEMNITY INSURANCE COMPANY OF AMERICA,
Plaintiff,

LOCKWOOD WAREHOUSE & STORAGE, ET AL,
Defendants,

MAXWELL HOUSE COFFEE COMPANY, KRAFT GENERAL FOOD, INC.,
Defendants — Appellants

v.

KRAFT GENERAL FOODS, INC.; GRAND LOCKWOOD PARTNERS LIMITED PARTNERSHIP; THIRD COAST PACKAGING; IGI BAYCHEM, INC.; OXID, INC.; RDA INTERNATIONAL, INC.; VISTA CHEMICAL,
Defendants — Appellees

v.

Enterplast, Inc.; H. Muehlstein & Co.,
Intervenor Defendants — Appellants.

Appeals from the United States District Court for the Southern District of Texas

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Before POLITZ, and DEMOSS, Circuit Judges, and JUSTICE,* District Judge.

JUSTICE, District Judge:

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* District Judge of the Eastern District of Texas, sitting by designation.

This appeal arises out of an interpleader action brought by Marine Indemnity Insurance Company of America ("Marine Indemnity") to resolve conflicting claims for insurance proceeds under an insurance policy issued by it to Lockwood Warehouse & Storage ("Lockwood"). The district court, upon recommendation of a special master, determined the issues of insurable interests, calculation of damages, and priority of claims, and entered final judgment. Defendants Maxwell House Coffee Company ("Maxwell") and Kraft General Foods, Inc. ("Kraft"), in addition to intervenor-defendants Enterplast, Inc. ("Enterplast") and H. Muehlstein & Company ("Muehlstein"), appeal the district court's order and seek review of its interpretation of the Marine Indemnity insurance policy. We affirm in part and reverse in part the district court's judgment.

I. Proceedings Below

In November 1993, a fire destroyed a warehouse owned by Grand Lockwood Partners Limited Partnership ("Grand Lockwood"). It was managed and leased by Lockwood at the time of the fire. Property worth millions of dollars that was stored in the warehouse was also destroyed by the fire. Lockwood maintained insurance coverage with Marine Indemnity for certain property inside the warehouse. Numerous owners of property stored inside the warehouse made claims against Marine Indemnity for the value of their damaged property. Because the claims exceeded the limits of the insurance policy, Marine Indemnity instituted this interpleader action.

In October 1995, the district court determined that the amount of insurance available under the Marine Indemnity policy was $1,275,610, plus accrued interest. The court ordered that Marine Indemnity pay this amount into the court's registry. The district court appointed a magistrate judge to act as special master and recommend findings of facts and conclusions of law on the issues of insurable interests, calculation of damages, and priority of claims. Issues concerning the causation of the fire and the liability

of the parties are the subjects of a separate proceeding pending in a Texas state court action. After holding a hearing on the parties' conflicting claims to the interpleaded funds and considering briefs submitted by the parties setting forth their respective positions, along with affidavits, documents, and deposition excerpts, the special master issued her report,[1] which the district court adopted. On March 4, 1996, after considering various motions and objections to the special master's report, the district court entered final judgment ordering the disbursement of the interpleaded funds. Kraft subsequently filed a motion for new trial which was denied. This appeal followed.

This appeal raises two primary disputes concerning the district court's disbursement of the Marine Indemnity insurance proceeds. First, intervenor-defendants Enterplast and Muehlstein object to the district court's order denying them any recovery from the interpleaded funds. Second, defendants Kraft, Maxwell, and Vista Chemical Company, who all recovered only a portion of their uninsured losses under the court's allocation of policy proceeds, contest the district court's award from the interpleaded funds, of $158,430.76, plus accrued interest, to Grand Lockwood, for the costs Grand Lockwood incurred in removing debris from the warehouse and cleaning up the warehouse property site. Each of these claims shall be addressed, in turn, below.

II. Analysis

A. Enterplast and Muehlstein's Right to Recover

The special master found two independent bases for denying both Enterplast and Muehlstein any recovery from the interpleaded funds. First, the court found that, given Enterplast's and Muehlstein's bailment relationship with sublessees of Lockwood, the Marine Indemnity policy provisions governing covered property barred the two entities from recovery. Lockwood had sub-

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[1] The special master also issued an errata sheet which she incorporated into her report and recommendation and which corrected several factual errors contained in the report.

leased space in the warehouse to Ultra Warehouse ("Ultra") and Lance Cowan, doing business as Shippers International ("Shippers"), who each stored, respectively, the property of Muehlstein and Enterplast.

The Marine Indemnity policy provided coverage of the following property:

> (A) Personal Property of the Insured pertaining to the conduct of the Insured's business.
>
> (B) Personal Property of others which is directly connected with the Insured's business while in the care, custody or control of the Insured, and for which the Insured is responsible, or for which the Insured has agreed in writing prior to loss to insure.
>
> (C) Real Property of the Insured.
>
> (D) To the extent of the Insured's business interests only, improvements and betterments to buildings occupied, but not owned by the insured.

The special master determined that the policy had three coverage requirements with respect to the property belonging to those other than Lockwood that was stored in the warehouse. First, the property must have been "directly connected" with Lockwood's business. Second, the property must have been in the "care, custody, or control" of Lockwood. Third, Lockwood must either have been "responsible" for the property or have had agreed in writing, prior to the fire, to insure the property. In construing the first requirement, the special master determined that the policy covered the property of those who stored property directly with Lockwood, but did not cover the property of those, including Enterplast and Muehlstein, who stored property with a sublessee of Lockwood. Because Enterplast and Muehlstein did not enter into an agreement with Lockwood for the storage of property, the court adjudged that neither entity could establish that it had a direct relationship or involvement with Lockwood, and thus also

concluded that their property could not be found to have been "directly connected" with Lockwood's business.

The special master also found that the third coverage requirement barred Enterplast and Muehlstein from recovery under the Marine Indemnity policy, in that they failed to establish that Lockwood was "responsible" for their property. Evidence was presented to the court that Muehlstein entered into a warehouseman's agreement with Ultra for the storage of its property. Under this agreement, Ultra disavowed responsibility for loss or damage to Muehlstein's goods, however caused. Moreover, evidence was adduced that Ultra and Shippers each entered into a sublease agreement with Lockwood, which stated, in each instance, that the sublease incorporated all terms and conditions of the master lease between Grand Lockwood and Lockwood. The master lease provided:

> Lessor and Lessee, in their own behalf and in behalf of their insurers, each hereby waive any and all claims which such party may have against the other party during the Term for any and all loss of, or damage to, any of such party's property located within or upon, or constituting a part of the Leased Premises or the Building to the extent that such loss or damage is or could have been covered by a standard Texas fire and extended coverage insurance policy, regardless of cause or origin, including the negligence (sole or otherwise), of such party hereto.

Since Ultra's and Shippers' leases with Lockwood, by incorporating the terms of the master lease, exonerated Lockwood and its insurers from any damage claims for Ultra's and Shippers property, the special master concluded that, based on these waiver of liability provisions, Lockwood was not responsible for the goods of Ultra and Shippers or the goods of their bailees, including Muehlstein and Enterplast.

The district court held that, even if it were to reject the incorporation of the master lease's waiver of liability provision,

Lockwood was not "responsible" for Muehlstein's and Enterplast's property, pursuant to the Texas law of leases and bailments. Under Texas law, a bailment is a delivery of goods to another which creates a duty of trust on the part of the bailee to return the deposited goods as directed. *Braniff Airways, Inc. v. Exxon Co. U.S.A.*, 814 F.2d 1030,1038 (5th Cir. 1987). A bailee has the duty to exercise ordinary care over the goods and is therefore "responsible" for the bailor's goods. *Allright, Inc. v. Elledge,* 515 S.W.2d 266, 267 (Tex. 1974); *Ampco Auto Parks, Inc. v. Williams,* 517 S.W.2d 401, 403 (Tex. Civ. App. — Dallas 1974, writ ref'd n.r.e.); *West v. Slaughter,* 384 S.W.2d 185, 187 (Tex. Civ. App. — Waco 1964, writ ref'd n.r.e.). In contrast, a lease is "a transfer of interest in and possession of property for a prescribed period of time in exchange for an agreed consideration called 'rent.'" *State Nat'l Bank v. United States,* 509 F.2d 832, 835 (5th Cir. 1975). The lessor has the duty of ordinary care in maintaining the premises it controls, but does not have a duty to exercise care regarding the lessee's property stored on the premises. *See Jones v. Houston Aristocrat Apartments, Ltd.,* 572 S.W.2d 1 (Tex. Civ. App. — Houston [1st Dist.] 1978, writ ref'd n.r.e.). The lessor is therefore not "responsible" for the property of the lessee. The district court found that the sublease agreement between Ultra and Lockwood, and also that between Shippers and Lockwood, established a lessor-lessee relationship. Consequently, the court found that, under Texas law, Lockwood was not responsible for the property of Ultra or Shippers, or the property of their bailors, Muehlstein and Enterplast.

The special master also denied recovery to Muehlstein and Enterplast, based on its finding that Muehlstein's and Enterplast's losses were covered by the Marine Indemnity policy's "other insurance" clause, which, together with considerations of equity, foreclosed recovery. The "other insurance" clause provided: "If at the time of loss, or damage, there is available to a named or unnamed insured or any other interested party any other insurance which would apply in the absence of this policy, the insurance under this policy shall apply only as excess insurance

over such other insurance." The court then held that, because the amount of claims to the policy exceeded the amount of interpleaded funds, those claimants who were not covered by other insurance should have first priority to the funds.

Muehlstein, the court found, lost $547,546.63 worth of goods in the fire and suffered a net sales loss of $1,078,233. The court concluded that, since Muehlstein recovered $750,000 from its own insurance company, Phoenix Assurance, Muehlstein had been fully compensated for the loss of its goods by other insurance, and, therefore, could not recover additional money from the interpleaded funds. Muehlstein objected to this finding in the special master's report and recommendation, maintaining that the majority of the proceeds it received from Phoenix Assurance covered its lost profits, but did not cover the value of its lost inventory. In this connection, Muehlstein contends that it suffered an uninsured loss of $1,078,233 minus $750,000, or $328,233. The district court overruled Muehlstein's objection, but did not directly address Muehlstein's claim regarding lost profits.

The court also found that Enterplast was fully compensated for the actual cash value of its property. Enterplast submitted a claim of $370,502 for the loss of its goods in the fire, of which its insurance carrier paid $347,911.49. It was also determined by the court that Enterplast had stored goods in the warehouse with a fair market value of $339,445. Enterplast did not object to the court's factual findings. Instead, Enterplast objected to the court's decision that those entities storing uninsured property in the warehouse with uninsured claims had first priority to the interpleaded funds. The district court overruled Enterplast's objection.

Enterplast and Muehlstein argue on appeal that the district court erred in denying them recovery of the interpleaded funds. They contend that they meet all three prerequisites to recovery under the Marine Indemnity policy: first, that the goods they stored in the warehouse were directly connected with Lockwood's business; second, that the goods were in the care, custody, or control of Lockwood; and finally, that Lockwood was responsible

for the goods. Further, Muehlstein argues that the district court erred in concluding that Muehlstein did not suffer an uninsured loss, and therefore fell into error in denying it recovery on this basis.

We review conclusions of law *de novo*. *Phillips Petroleum Co. v. Best Oilfield Services, Inc.*, 48 F.3d 913, 915 (5th Cir. 1995). We review the factual findings of the special master, adopted by the district court, for clear error. Fed. R. Civ. P. 52(a); *see also Sherri A.D. v. Kirby*, 975 F.2d 193, 207 n.25 (5th Cir. 1992). The district court's finding concerning the priority of claims (to the extent that the priority of claims was not controlled by policy language or controlling law) is neither a conclusion of law nor a factual finding, but is, instead, an equitable decision. *See Bricks Unlimited, Inc. v. Agee*, 672 F.2d 1255, 1261 (5th Cir. 1982) ("In determining the order of distribution of the interpleaded funds, we sit as a court of equity, and possess the remedial flexibility of a chancellor in shaping our decree so as to do complete equity between the parties."); *see also American Airlines, Inc. v. Block*, 905 F.2d 12, 14 (2d Cir. 1990) ("[I]t is well recognized that interpleader is an equitable remedy. . . ."); *Fulton v. Kaiser Steel Corp.*, 397 F.2d 580, 583 (5th Cir. 1968) ("Interpleader generally is a suit in equity which invokes equitable principles."). Hence, we review the priority of claims finding for abuse of discretion. Based on these standards of review, we affirm the district court's judgment barring Muehlstein and Enterplast from recovery of the interpleaded funds. Specifically, we affirm the district court's holding that Lockwood was not responsible for the property of Muehlstein and Enterplast under the Marine Indemnity policy. Further, we find that the court did not commit clear error in finding that Muehlstein and Enterplast were fully compensated for their losses, and that the court did not abuse its discretion in ruling that those with uninsured losses should receive priority over Muehlstein and Enterplast to the limited interpleaded funds.

1. *Lockwood's responsibility under the insurance contract.* Both Muehlstein and Enterplast contend, on appeal, that

Lockwood was responsible for their property by the terms of the insurance policy, since it maintained control over the warehouse: that is, by directing and performing warehouse maintenance, repairs, security, housekeeping, and fire protection, among other things, Lockwood thereby assumed obligations and duties with regard to all property in the warehouse. Muehlstein and Enterplast argue that the negligent performance of these duties by Lockwood rendered it, as landlord, liable, and hence responsible, for the destruction to their property.

We agree with the district court that Texas law, which governs this case, does not support the bailors' interpretation of the term "responsible" in the insurance contract. Pursuant to Texas law, responsibility for goods is dependent on the existence of a bailor-bailee relationship. A bailee, in contrast to a lessor, assumes a duty of care with regard to both the premises and the goods in its possession. As a lessor, Lockwood had a duty to exercise care respecting the portions of the warehouse it controlled,[2] but did not have a general duty to exercise care as to the sublessees' property stored on the premises or care with relation to the property of the sublessees' bailors. Thus, as lessor, Lockwood was not responsible for the property of the Muehlstein and Enterplast.

In support of its argument, Enterplast cites to the case of *Brown v. Frontier Theaters, Inc.*, 369 S.W.2d 299 (Tex. 1963). In *Brown,* the Texas Supreme Court held that, if a landlord retains control over a portion of the leased premises, "the landlord is charged with the duty of ordinary care in maintaining the portion retained so as to not damage the tenant." *Id.* at 303. Frontier Theaters was found to be in control of the upper portion of the

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[2] Texas law provides that, "[g]enerally, a landlord who retains control over a part of the premises that the tenant is entitled to use owes a duty to exercise ordinary care" over such commonly used premises. *Stein v. Gill,* 895 S.W.2d 501, 502 (Tex. App. — Fort Worth 1995, no writ). Because we find that, regardless of whether Lockwood exercised control over the warehouse premises, Lockwood was not responsible for the property of Muehlstein and Enterplast, we need not and do not rule on the issue of Lockwood's control and corresponding duty of care over the premises.

trate Stacy issued an Errata Sheet Supplementing the Special Master's Report and Recommendation (Instrument #170) on February 6, 1996 which corrected a few typographical and computational errors in the report and recommendation.

The background of this case is presented in the report and recommendation so the Court will not recite it here. The Marine Indemnity insurance policy at issue in this case provides for coverage of:

> (A) Personal property of the Insured pertaining to the conduct of the Insured's business.
>
> (B) Personal property of others which is directly connected with the insured's business while in the care, custody or control of the Insured, and for which the Insured is responsible, or for which the Insured has agreed in writing prior to the loss to insure.
>
> (C) Real property of the Insured.
>
> (D) To the extent of the Insured's business interests only, improvements and betterments to buildings occupied, but not owned by the Insured.

Based on this policy language, Magistrate Stacy determined that in order to be entitled to any of the interpled funds to cover property loss in the warehouse fire, each claimant had to establish that its property loss was directly related to Lockwood's business while in the care, custody, or control of Lockwood and that Lockwood was responsible for the property or Lockwood had agreed in writing to insure the property prior to the time of the loss. Instrument #153 at 23. Magistrate Stacy also concluded that Lockwood owed no duty towards property belonging to those parties who simply had sublease relationships with Lockwood as opposed to bailment relationships. *Id.* at 28. Magistrate Stacy also concluded that in keeping with the equitable nature of an interpleader action, *Great Am. Ins. Co. v. Spraycraft, Inc.*, 844 F. Supp. 1188, 1191 (S.D. Ohio 1994), the other insurance clause in the Marine Indemnity policy should be applied to not allow

parties who were already compensated for their loss by other insurance to recover additional money from the interpled funds. Instrument #153 at 42-47. Applying these requirements to each parties' loss, Magistrate Stacy was able to determine the total amount of claims recoverable under the policy and the pro rata distribution of the funds to the eligible parties.

The Court has reviewed the submissions of the parties, the applicable law, and the report and recommendation. The Court is in agreement with Magistrate Stacy's determination and application of law in this case. However, before ruling on the report and recommendation, the Court will first consider the various motions and objections filed in response to the report and recommendation.

1. Ultra's Motion to Amend (Instrument #156) and Objection to Report and Recommendation (Instrument #157)

On January 12, 1996, Ultra filed its motion to amend the report and recommendation and objection to the report and recommendation. Ultra seeks to have paragraph C.1 of the Conclusion of Law on Insurable Interest amended to indicate that Lockwood was responsible for Ultra's property in the warehouse and Ultra, therefore, has an uninsured loss of $8897.00. Magistrate Stacy determined that since Ultra's relationship with Lockwood was based on a sublease and since the sublease incorporated the insurance terms of the master lease which exonerated Lockwood and its insurers from any property damage claims, Lockwood was not responsible for Ultra's property. Instrument #153 at 35. Ultra argues that Magistrate Stacy erred with respect to this legal conclusion. Ultra claims that the sublease only incorporates "applicable" terms and conditions of the master lease and that the waiver clause at issue was not "applicable" to the sublease. Alternatively, Ultra argues that if the waiver clause is "applicable," then the waiver did not comply with the fair notice requirements of conspicuousness to be effective as to Ultra. Ultra also contends that, under Texas law, Lockwood owed Ultra a duty to

maintain the portions of the warehouse within its control in such a manner as to not damage Ultra's property. It is clear that Ultra's only objections are to the Magistrate's conclusions and application of law. Ultra has not challenged any factual determinations.

Even if the Court were to accept Ultra's argument that the waiver clause is not binding on it, Ultra still would not be entitled to the interpled funds. The Court agrees with Magistrate Stacy's interpretation of Texas case law that a lessor owes a duty with respect to the leased premises but there is no inherent or implied duty of a lessor with respect to the personal property of a lessee. This bars Ultra from recovery because it cannot show that its property was in the care of Lockwood or that Lockwood was responsible for it. Therefore, Ultra's motion to amend should be denied and its objection overruled.

2. Muehlstein's Objection to Report and Recommendation (Instrument #158) and Motion to Amend (Instrument #159)

Initially, Muehlstein has pointed out a typographical error in Finding of Fact No. 50 in the report and recommendation. The errata sheet issued by Magistrate Stacy has corrected the Finding of Fact to state that Muehlstein stored packaged plastic materials with a cost of $547,546.63 at the warehouse. *See* Instrument #170. Muehlstein concedes that it received $750,000.00 from its own insurance company but claims the proceeds covered Muehlstein's lost profits, as opposed to inventory. Therefore, Muehlstein claims that its has an uninsured loss of $547,546.63. Muehlstein had a contract with Ultra whereby Ultra stored goods for Muehlstein. Muehlstein believes that its property loss should be covered under the Marine Indemnity policy because Lockwood was in the business of storing and running a warehouse and Muehlstein's loss was directly related to Lockwood's business.

Muehlstein's recovery is directly related to Ultra's being able to recover. As discussed in the previous section, Ultra cannot recover under the policy. Muehlstein cannot recover either because

Lockwood was not responsible for Muehlstein's property. Therefore, Muehlstein's motion to amend should be denied and its objection overruled.

3. Kraft and IGI Baychem's Objections To Report and Recommendation (Instrument #160)

Kraft General Foods, Inc. ("Kraft") and IGI Baychem, Inc. ("IGI Baychem") have filed a joint objection to the report and recommendation wherein they agree with Magistrate Stacy's classification of Kraft and IGI Baychem. They believe, however, that they should be given priority over the other claimants in their class because they are the only parties with written agreements with Lockwood to provide insurance coverage. Kraft and IGI Baychem also argue that Lockwood Partners should not be allowed to recover for its costs of debris removal because the debris removal clause in the Marine Indemnity policy only applies to removal costs of the insured, Lockwood, not Lockwood Partners.

Kraft and IGI Baychem's argument with respect to their receiving first priority because they had written agreements with Lockwood for insurance would result in giving priority to them over parties who had oral agreements. However, it is well settled that oral agreements and written agreements should be given equal priority. *Tillerson v. Highrabedian,* 503 S.W.2d 398, 400 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref. n.r.e.). Therefore, the Court will overrule Kraft and IGI Baychem's objection on priority.

With respect to Kraft and IGI Baychem's argument that Lockwood Partners cannot recover for the debris removal or alternatively for the full amount of the debris removal, Lockwood Partners has pointed out that Kraft and IGI Baychem are relying on one of two debris removal provisions in the Marine Indemnity policy. Lockwood Partner's has shown that in the July 6, 1993 endorsement to the policy, the debris removal clause was extended to cover "costs of clean up, at the premises of the Assured,

made necessary as a result of such direct physical loss or damage . . . ." Instrument #165 at 2; Instrument #116, Exhibit D. Based on this provision of the policy, Kraft and IGI Baychem's objections to Lockwood Partners' recovery for debris removal should be overruled.

4. Kraft's Objections to Report and Recommendation (Instrument #161)

Kraft filed an additional objection to the Report and Recommendation four days after the previous objection presenting the same argument about Lockwood Partners not being an insured under the policy. Kraft also argues that the debris removal clause only covers removal of property that was covered by the policy, but Lockwood Partners only presented evidence of the cost for removing all the debris without differentiation between property covered and property not covered.

Additionally, Kraft objects to Magistrate Stacy's failure to require Marine Indemnity to deposit an additional $56,390 with the Court because Marine Indemnity's earlier payment to Lockwood for Lockwood's loss to betterments and improvements at the warehouse was made in bad faith. The Court, however, will summarily overrule this objection because Marine Indemnity has been dismissed from this case in response to an unopposed motion to dismiss.

In accordance with the discussion of the debris removal coverage in the previous section, Kraft's objection to Lockwood Partners' recovering for its costs incurred in debris removal should be overruled.

5. Simpson Paper's Objection to Report and Recommendation (Instrument #162)

Simpson Paper Company and Simpson Pasadena Paper Company (collectively "Simpson") filed an objection to the report and recommendation. Simpson believes that Magistrate Stacy erred holding that Simpson was not connected to Lockwood since

Simpson's contract was with Ultra. Simpson believes that its presence of goods in the warehouse was a direct and foreseeable consequence of the lease between Ultra and Lockwood. Therefore, Simpson contends its loss occurred in direct relation to Lockwood's business and should be covered by the policy. Simpson also argues that Lockwood's duty of care to it is unaffected by Ultra's waiver in its lease with Lockwood of its right to recover damages because Lockwood's duty to Simpson arose from common law and not by virtue of Ultra's lease.

As discussed earlier, a party has to establish that Lockwood was responsible for its goods to recover under the policy. Simpson's presence in the warehouse was pursuant to a bailment agreement with Ultra. Since Ultra cannot recover under the policy, Simpson cannot either. Accordingly, Simpson's objection should be overruled.

6. Enterplast's Objection to Report and Recommendation (Instrument #163)

Enterplast, Inc. ("Enterplast") filed an objection to the report and recommendation wherein it objects to the determination that Enterplast's goods were directly related to Lockwood's business and that Magistrate Stacy's conclusion that Texas case law which addresses other insurance clauses does not apply in this case. Enterplast presents the same argument as the other objecting parties by arguing that Lockwood was in the business of storing property and so all property in the warehouse was directly related to Lockwood's business. With respect to its other insurance clause argument, Enterplast urges the Court to apply the general rule in *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exchange,* 444 S.W.2d 583 (Tex. 1969), and determine that it has a pro rata claim based on its own insurance and the Marine Indemnity policy and allow it to recover its pro rata share of the interpled funds.

The Court has reviewed Magistrate Stacy's legal analysis and conclusion that *Hardware Dealers* does not apply to this case and

concurs with this conclusion. Therefore, the objection should be overruled.

7. Lockwood Partners' Motion to Amend (Instrument #164) and Motion to Reform (Instrument #165)

Lockwood Partners' basis for these motions is to correct a typographical error in the report and recommendation. In the errata sheet, Magistrate Stacy corrected the typographical error to indicate that Lockwood Partners had damages of $379,000. Therefore, Lockwood Partners' motions should be denied as moot.

It is important to note that none of the parties have objected to any factual determinations made by Magistrate Stacy. The parties do not contest the valuation or the factual circumstances surrounding the parties' relationships. All of the objections to the report and recommendation which have been filed by the parties are directed exclusively at legal issues. There are not any factual issues in dispute. Therefore, the Court can enter judgment in this case without any further proceedings. Since the various objections of the parties have been overruled and the Court finds the Magistrate's report and recommendation, supplemented by the errata sheet, to be proper, the Court will adopt the report and recommendation as the opinion of the Court.

Accordingly, the Court hereby

ORDERS that the parties' objections to the Report and Recommendation are **OVERRULED**; and

ORDERS that Ultra's motion to amend is **DENIED**; and

ORDERS that Muehlstein's motion to amend is **DENIED**; and

ORDERS that Lockwood Partners' motion to amend and motion to reform the recommendations are **DENIED as moot**; and further

ORDERS that Magistrate Stacy's Report and Recommendation and Errata Sheet Supplementing the Special Master's Report and Recommendation are **ADOPTED** as the opinion of this Court.

SIGNED at Houston, Texas this, 28th of February 1996.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARINE INDEMNITY INSURANCE,	§
Plaintiff,	§
	§
V.	§
	§
LOCKWOOD WAREHOUSE & STORAGE, THIRD COAST PACKAGING, SNAVELY FOREST PRODUCTS, INC., MICHAEL DURHAM, IGI BAYCHEM, INC., INTEGRATED LABS, ATLANTIS INTERNATIONAL COMMODITIES, INC., OXID, INC., R.D.A. INTERNATIONAL, INC., VISTA CHEMICAL,, PHOENICIAN ENTERPRISES, INC., MAXWELL HOUSE COFFEE COMPANY, SHIPPERS INTERNATIONAL, INC., CXI, INC., ULTRA WAREHOUSE, INC., CITATION CORPORATION, FRITZ COMPANIES, INC., GRAND LOCKWOOD PARTNERS LIMITED PARTNERSHIP, and INTEGRATED FURNITURE & EQUIPMENT,	§
Defendants.	§

SPECIAL MASTER'S REPORT AND RECOMMENDATION

Pursuant to Rule 53 of the Federal Rules of Civil Procedure, the Magistrate Judge was appointed as a Special Master in this Case. According to the Order of reference, the Master was instructed to consider the issues of insurable interest, calculation

of damages and priority of claims. After considering the parties' submissions, the evidence and argument received at a hearing held on November 13, 1995, the following report is submitted.

I. PROCEDURAL HISTORY

The facts surrounding this interpleader action are not in dispute. On November 8, 1993, fire destroyed an entire warehouse owned by Grand Lockwood Partners Limited Partnership ("the Partnership") and managed by Lockwood Warehouse & Storage ("Lockwood"). Property stored in the warehouse was also destroyed by the fire. Although Lockwood had insurance on the warehouse and its contents, the amount of the insurance available was not sufficient to cover all the losses claimed. On July 18, 1994, Plaintiff Marine Indemnity Insurance Company of America ("Marine Indemnity"), Lockwood's insurer, instituted the instant interpleader action. In its Interpleader Complaint, Marine Indemnity alleged:

> Marine Indemnity insured Lockwood under an inland-marine policy which covers specified risks of loss to property in Lockwood's care, custody or control and for which Lockwood is responsible and for personal property of others which Lockwood agreed in writing to insure .... As a result of the fire, Lockwood and the owners of the property have made conflicting demands on Marine Indemnity for payment .... Because of these conflicting demands, Marine Indemnity is exposed to potentially inconsistent obligations and liability under the policy and brings this action to interplead the remaining limits of insurance.

Complaint for Interpleader at 5-6. On October 3, 1995, United States District Judge Melinda Harmon determined that the amount of insurance available for the Defendants under the Marine Indemnity policy was $1,275,610, plus accrued interest. On that same date, Judge Harmon appointed United States Magistrate Judge Frances H. Stacy as a Special Master, directing her to submit a report within 90 days, on the issues of "insurable

interests, calculation of damages and priority of claims." Memorandum and Order of October 3, 1995.

II. ISSUES

As per the District Judge's reference, the following issues are before the Master for a recommendation:

1. insurable interests;
2. calculation of damages; and
3. priority of claims.

There is no real dispute between the parties as to each claimant's alleged losses. There is, however, great dispute on the insurability of the parties' interests and the priority of the parties' claims.

As to the insurable interest issue, those Defendants who leased space in the warehouse directly from Lockwood or paid Lockwood directly for storing their goods in the warehouse contend that they have a valid interest in the interpled funds, while those who subleased space or stored their goods with a party other than Lockwood do not. In contrast, those who subleased space or stored their goods with other parties argue that because Lockwood had "care, custody and control" over all the goods in the warehouse, they also have a valid interest in the interpled funds.

As to the priority of claims issue, Defendants have suggested three theories. The first is based on the amount and existence of insurance other than that provided by the Marine Indemnity policy. Those Defendants who favor this theory argue that claims which are not covered by insurance other than the Marine Indemnity insurance should have priority over claims which are completely covered by other insurance. This theory is based on the language in the Marine Indemnity Policy which makes the Marine Indemnity insurance excess to any other available insurance. The second theory is that claims of Defendants who had a written lease or storage agreement with Lockwood in which Lockwood agreed to maintain insurance on property being stored

in the warehouse, should have priority over claims of Defendants who did not have a written lease or storage agreement and were not given written assurances that insurance would be maintained. Under this theory, those Defendants who had written contracts with Lockwood which provided for insurance would have first priority; those with oral contracts with Lockwood which included promises of insurance coverage would have second priority; and those who did not lease or store their goods directly with Lockwood, would have last priority. The third theory is that Defendants who leased warehouse space or stored their goods directly with Lockwood should have priority over those who subleased space or stored their goods with others, without regard to whether their lease or storage agreements were written or oral. In addition, all Defendants other than Grand Lockwood Partners Limited Partnership argue that Grand Lockwood Partners Limited Partnership should be given last priority in light of the allegations that it was its negligence or contributory negligence which caused the fire at the Lockwood warehouse.

III. THE CLAIMANTS/DEFENDANTS

Marine Indemnity named the following parties as Defendants in this Interpleader action: 1) Lockwood Warehouse and Storage; 2) Third Coast Packaging; 3) Snavley Forest Products, Inc.; 4) Michael Durham; 5) IGI Baychem, Inc.; 6) Integrated Labs; 7) Atlantis International Commodities, Inc.; 8) Oxid, Inc.; 9) R.D.A. International, Inc.; 10) Vista Chemical; 11) Phoencian Enterprises, Inc.; 12) Maxwell House Coffee Company; 13) Shippers International, Inc.; 14) CXI, Inc.; 15) Ultra Warehouse, Inc.; 16) Citation Corporation; 17) Fritz Companies, Inc.; 18) Grand Lockwood Partners Limited Partnership; and 19) Integrated Furniture and Equipment. Three of these named Defendants, Phoencian Enterprises, Inc., Shippers International, Inc., and CXI, Inc. have not made an appearance in this case, and any claim they may have had to the interpled insurance proceeds will not be considered. On October 4, 1994, October 19, 1994, February 6, 1995, and August 7, 1995, respectively, Custom Form

Transportation Systems, Simpson Paper Company, H. Muelstein & Co., Inc., and Enterplast, Inc. intervened in this case, claiming an interest in the interpled funds based on their respective losses of property which had been stored in the Lockwood warehouse. On November 13, 1995, Defendant Integrated Laboratory Furniture & Equipment, improperly named as two separate Defendants, Integrated Labs and Integrated Furniture & Equipment, informed the Master that it was withdrawing its claim of $30,000 to the interpled funds. A letter confirming that withdrawal followed in which Integrated Laboratory Furniture & Equipment sought to be dismissed from this case. See Exhibit "A", attached to this Report and Recommendation.

IV. THE POLICY

The Marine Indemnity policy, which was issued to Lockwood Warehouse and Storage as the Insured, provides coverage for:

> (A) Personal property of the Insured pertaining to the conduct of the Insured's business.
>
> (B) Personal property of others which is directly connected with the Insured's business while in the care, custody or control of the Insured, and for which the Insured is responsible, or for which the Insured has agreed in writing prior to the loss to insure.
>
> (C) Real property of the Insured.
>
> (D) To the extent of the Insured's business interests only, improvements and betterments to buildings occupied, but not owned by the Insured.

Exhibit "A" at 1, attached to Complaint for Interpleader. In addition, the policy provides coverage for debris removal in a separate debris removal clause:

> This policy is extended, subject otherwise to its full terms, conditions and limitations, to cover the Insured's expenses incurred in the removal of all debris of the property insured

> hereunder, at the premises where the loss occurs, which may be occasioned by loss or damage directly caused by any of the perils insured against in this policy, but excluding any additional or unusual expenses caused by or resulting from compliance with regulations of any governmental or environmental agency.

Exhibit "A" at 6, attached to Complaint for Interpleader.

The policy specifically excludes from coverage certain types of damages including, "delay, loss of market, loss of use; interruption of business, except as provided elsewhere herein, or UNLESS endorsed hereon." Exhibit "A" at 2, attached to Complaint for Interpleader. The basis for calculating losses or payments under the policy is the "actual cash value" of the property lost, with a deductible of $5000 for each claim made. Exhibit "A" at 4, 5, attached to Complaint for Interpleader. Coverage under the policy is excess to any other available insurance:

> Other Insurance: If at the time of loss, or damage, there is available to a named or unnamed insured or any other interested party any other insurance which would apply in the absence of this policy, the insurance under this policy shall apply only as excess insurance over such other insurance.

Exhibit "A" at 10, attached to Complaint for Interpleader.

V. FINDINGS OF FACT

After reviewing all the evidence submitted by the parties and considering the evidence received at the evidentiary hearing on November 13, 1995, the Master makes the following findings of fact.

1. Grand Lockwood Partners Limited Partnership owned the warehouse at 600 Lockwood, Houston, Texas, referred to herein as the "Lockwood warehouse." Affidavit of Martin C. Leibowitz, attached to Grand Lockwood Partners Limited Partnership's Brief in Support of its Claim in Interpleader.

theater and, after the court ruled that Frontier had been negligent in maintaining that portion of the theater, it held Frontier liable for damages to the tenant's property in the lower portion of the theater. Enterplast confuses responsibility for the *premises* with responsibility for *property stored on the premises*. Contrary to Enterplast's argument, *Frontier Theaters* only relates to a lessor's duty with regard to the portion of the leased premises it retained. If a lessor does not fulfill its duty of care with respect to the premises it controls and thereby causes damage to the lessee's property, regardless of whether the property is stored on the retained premises or unretained premises, the lessor may be held liable for the property damage. But a lessor's liability for damaged property stored on the premises arises only out of its responsibility to maintain the lessor's retained part of the premises with due care; it does not ensue from a responsibility to maintain with due care the property stored by others inside the premises. Only a bailee, not a lessor, assumes this latter responsibility.

Finally, Muehlstein's and Enterplast's argument that Lockwood was responsible for their property is barred by the exculpatory clause contained in the master lease and incorporated into the sublease agreement between Lockwood and Ultra, as well as between Lockwood and Shippers. The exculpatory clause provides that the lessor is not liable for any damage to the lessee's property, to the extent that the property damage is or could have been insured. Under Texas law, exculpatory clauses will ordinarily be enforced, if they are between private persons who bargain from positions of equal strength. *Crowell v. Housing Authority,* 495 S.W.2d 887, 889 (Tex. 1973). The parties do not contend that the exculpatory clause is void as a matter of public policy; instead, they contend that, although the clause may apply to Ultra and Shippers, the clause does not apply to them, as bailors of Ultra and Shippers. This claim is unavailing. If Lockwood, pursuant to the exculpatory clause, waived its liability for damage to the property of Ultra and Shippers, Lockwood cannot then be said to be responsible for the goods that they, as bailees, stored on behalf of others, including Muehlstein and Enterplast.

2. *Priority to the interpleaded funds.* In its initial brief, Enterplast does not contest the district court's denial of recovery to Enterplast on the ground that it was fully compensated for its losses and should therefore receive last priority to the interpleaded funds. As a result, Enterplast abandons its right to raise this issue on appeal. *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1255 (5th Cir. 1990). Muehlstein, on the other hand, continues to maintain that it was not fully compensated for the losses it suffered with respect to the stored goods that were destroyed by the warehouse fire, and that, consequently, it suffered a loss which the Marine Indemnity policy should compensate. The Marine Indemnity policy covers only the value of lost property. Muehlstein's policy with Phoenix Assurance, on the other hand, covers net sales value. Muehlstein presented evidence that Phoenix Assurance paid Muehlstein the $750,000 limits under the policy for "losses to Muehlstein's inventory based on net sales value."

Muehlstein contends, first, that the entire $750,000 it recovered under the Phoenix Assurance policy covered only its lost profits and did not cover the value of the stored goods. In the alternative, Muehlstein maintains that, if net sales loss includes a component of both lost profits and the value of its stored goods, then, because Muehlstein only recovered 69.6% of its claim from Phoenix for net sales loss, the court should have allocated this percentage to each of the components of Muehlstein's claim. Thus, Muehlstein argues that the trial court should have found that Muehlstein did not recover 30.4% of the actual value of its stored goods, or $174,662.60.[3]

Muehlstein, as a claimant to the interpleaded funds, had the burden of establishing by the preponderance of the evidence that

---

[3] Muehlstein erroneously uses the figure of $574,546.63 as the amount of its inventory losses in arriving at the final uninsured loss figure of $174,662.60 ($574,546.63 × 30.4%). The special master, however, found that the amount of inventory losses was $547,546.63. Accordingly, if only 69.6% of Muehlstein's inventory costs were paid by other insurance, Muehlstein is left with an uninsured loss of $166,454.18 ($547,546.63 × 30.4%), not $174,662.60.

is was entitled to recover. After reviewing the record and considering the arguments of the parties, we find that it was not clearly erroneous for the special master to have found that Muehlstein was fully compensated for the value of its lost goods. Moreover, in light of the fact that the claims exceeded the amount of the interpleaded funds, it was not an abuse of discretion to give those who were not fully compensated first priority to the funds.

B. Grand Lockwood's Right to Recover

Kraft, Maxwell, and Vista Chemical (referred to collectively as "Kraft") object to the district court's award of $158,430.76 to Grand Lockwood, for the costs Grand Lockwood incurred in removing debris from the warehouse and cleaning up the warehouse property site after the fire. Grand Lockwood contends that Lockwood terminated its lease with Grand Lockwood and refused to clean up the warehouse site and remove debris from the premises, as it was obligated to do under the lease.

The Marine Indemnity policy contained two provisions governing debris removal and cleanup expenses. Section 13 provided:

> This policy is extended, subject otherwise to its full terms, conditions and limitations, to cover the Insured's expenses incurred in the removal of all debris of the property insured hereunder, at the premises where the loss occurs, which may be occasioned by loss or damage directly caused by any of the perils insured against in this policy . . . .

The "Debris Removal and Cost of Clean Up Extension" ("debris removal extension") provided:

> [I]n the event of direct physical loss or damage to the property insured hereunder, this Policy ... also insures, within the sum insured
>
> (a) expenses reasonably incurred in removal of debris of the property insured hereunder destroyed or damaged from the premises of the Assured; and/or

> (b) cost of clean up, at the premises of the Assured, made necessary as a result of such direct physical loss or damage . . . .

The special master found that, after the fire, Grand Lockwood spent in excess of $384,000 to remove debris and clean up the warehouse premises. Taking into consideration the $5,000 deductible under the Marine Indemnity policy, the magistrate judge then concluded that Grand Lockwood incurred damages of $379,000 that were covered by the Marine Indemnity Policy. The district court, in adopting these findings, granted Grand Lockwood a pro rata portion of the interpleaded funds, thereby diminishing the pool of interpleaded funds available to the other parties with claims.

On appeal Kraft contests the court's disbursement of interpleaded funds to Grand Lockwood on the following grounds: (1) the Marine policy does not provide coverage to Grand Lockwood; (2) claims for damaged property should receive first priority; (3) Lockwood did not present evidence that it established the condition precedent under the Marine policy, which requires that Lockwood give notice of its intent to claim recovery for debris removal or clean-up costs; and (4) Grand Lockwood failed to offer evidence that the debris removal expenses it incurred were related to the removal of property insured under the policy.

Insurance policies are no exception to the rule that one for whose benefit a contract is made may enforce the contract. However, under Texas law, a presumption exists that parties intended to contract only for themselves. *Talman Home Fed. Sav. & Loan Assoc. of Ill. v. American Bankers Ins.*, 924 F.2d 1347,1351 (5th Cir. 1991). Because Grand Lockwood is not a party to the Marine Indemnity insurance contract, "it follows that [the Marine Indemnity insurance] contract will not be construed as having been made for the benefit of [Grand Lockwood] unless it clearly appears that this was the intention of the contracting parties." *Id.; see also Resolution Trust Corp. v. Kemp*, 951 F.2d

657, 662 (5th Cir. 1992). "If there is any doubt concerning the intent in this regard as it appears from the contract itself, such doubt should be construed against such intent." *Talman*, 924 F.2d at 1351 (quoting *Republic Nat'l Bank*, 427 S.W.2d 76, 80 (Tex. Civ. App. — Dallas 1968, writ ref'd n.r.e.)).

The first provision of the Marine Indemnity policy concerning debris removal costs explicitly states that the policy covers the "Insured's expenses" for debris removal. The policy also expressly states that Lockwood is the "Insured." The second provision relating to debris removal, which is contained in the debris removal extension, does not state who can claim debris removal costs. While the debris removal extension does not explicitly exclude coverage to a third party, it also does not explicitly provide coverage to a third party. Nor do any other portions of the insurance contract demonstrate that Grand Lockwood was intended to be a beneficiary under the debris removal and clean-up cost provisions. In contrast, the property coverage provisions of the contract, by referring to the property of "others," specifically provide that certain third parties storing property in the Lockwood warehouse were intended beneficiaries under the policy.

Moreover, the debris removal extension contains a requirement that the "Assured shall give notice to the Underwriters of intent to claim for cost removal of debris or cost of clean up . . . ." In effectuating the intent of the parties to a contract, "[i]t is the duty of the Court to construe the contract as an entire instrument, and to consider each part with every other part so that the effect and meaning of one part on any other part may be determined." *Steeger v. Beard Drilling, Inc.*, 371 S.W.2d 684, 688 (Tex. 1963); *see also Mustang Tractor & Equip. Co. v. Liberty Mut. Ins. Co.*, 76 F.3d 89, 91 (5th Cir. 1996) (Texas law requires that the court read all provisions of a contract together in order to give each prevision its intended effect). The notice requirement in the debris removal extension is rendered meaningless, unless the parties intended that only Lockwood could claim expenses for debris removal and clean-up costs. In order to give effect to the

notice requirement, which requires that Lockwood provide notice to Marine Indemnity of its intent to claim debris removal and clean-up costs, we find that Grand Lockwood was not entitled to make a claim for these costs. In summary, Grand Lockwood has failed to meet its burden of proof in establishing that it was an intended beneficiary under the debris removal and clean up provisions of the Marine Indemnity contract, and, for this reason, we reverse the judgment of the district court.

M. Conclusion

In light of the foregoing, we affirm the district court's judgment that Muehlstein and Enterplast are not entitled to recover under the Marine Indemnity policy. We reverse the district court's judgment awarding interpleaded funds to Grand Lockwood and remand for a recalculation and redistribution of the interpleaded funds.

APPENDIX B

IN THE

United States Court of Appeals For the Fifth Circuit

No. 96-20441

MARINE INDEMNITY INSURANCE COMPANY OF AMERICA,

Plaintiff,

V.

LOCKWOOD WAREHOUSE & STORAGE, ET AL

Defendants

MAXWELL HOUSE COFFEE COMPANY;
KRAFT GENERAL FOODS INC;

Defendants — Appellants

V.

KRAFT GENERAL FOODS INC;
GRAND LOCKWOOD PARTNERS LIMITED PARTNERSHIP; THIRD COAST PACKAGING;
IGI BAYCHEM, INC;
OXID, INC; R D A INTERNATIONAL, INC;
VISTA CHEMICAL

Defendants — Appellees

V.

ENTERPLAST, INC; H MUEHLSTEIN & CO

Intervenor Defendants — Appellants.

Appeals from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before POLITZ and DEMOSS, Circuit Judges, and JUSTICE,* District Judge.

PER CURIAM:

* District Judge of the Eastern District of Texas, sitting by designation.

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX C

IN THE

United States Court of Appeals For the Fifth Circuit

No. 96-20441

MARINE INDEMNITY INSURANCE COMPANY OF AMERICA,

Plaintiff,

V.

LOCKWOOD WAREHOUSE & STORAGE, ET AL

Defendants

MAXWELL HOUSE COFFEE COMPANY;
KRAFT GENERAL FOODS INC;

Defendants — Appellants

V.

KRAFT GENERAL FOODS INC;
GRAND LOCKWOOD PARTNERS LIMITED PARTNERSHIP; THIRD COAST PACKAGING;
IGI BAYCHEM, INC;
OXID, INC; R D A INTERNATIONAL, INC;
VISTA CHEMICAL

Defendants — Appellees

V.

ENTERPLAST, INC; H MUEHLSTEIN & CO

Intervenor Defendants — Appellants.

Appeals from the United States District Court for the Southern District of Texas, Houston

Before POLITZ and DEMOSS, Circuit Judges, and JUSTICE,* District Judge.

ORDER:

* District Judge of the Eastern District of Texas, sitting by designation.

IT IS ORDERED that the motion of appellee, Grand Lockwood Partners Limited Partnership, for clarification of the opinion filed June 4, 1997, is denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARINE INDEMNITY INSURANCE COMPANY OF AMERICA, Plaintiff, vs. LOCKWOOD WAREHOUSE & STORAGE ET AL., Defendants.	CIVIL ACTION NO. H-94-2430

FINAL JUDGMENT

In accordance with the Court's Memorandum Opinion and Order of this day adopting United States Magistrate Judge Frances H. Stacy's Special Master's Report and Recommendation (Instrument #153) and Errata Sheet Supplementing the Special Master's Report and Recommendation (Instrument #170), the Court hereby

ORDERS that the interpled funds in the Registry of the Court shall be distributed pro rata as follows:

(1) Kraft General Foods, Inc.: 32.61% of the interpled funds plus interest;[1]

(2) IGI Baychem: 3.11% of the interpled funds plus interest;[2]

---

[1] Kraft's pro rata share of the interpled funds is calculated as follows: $995,000 (Kraft's covered claim) / $3,050,947.95 (total covered claims) = 32.61%.

[2] IGI Baychem's pro rata share of the interpled funds is calculated as follows: $95,000 (IGI Baychem's covered claim) / $3,050,947.95 (total covered claims) = 3.11%.

(3) Michael L. Durham, P.C.: 7.18% of the interpled funds plus interest;[3]

(4) Vista Chemical: 39.26% of the interpled funds plus interest;[4]

(5) Third Coast Packaging: 2.03% of the interpled funds plus interest;[5]

(6) Oxid, Inc.: 0.89% of the interpled funds plus interest;[6]

(7) R.D.A. Trading, Inc.: 2.50% of the interpled funds plus interest;[7] and

(8) Grand Lockwood Partners Limited Partnership: 12.42% of the interpled funds plus interest.[8]

The Court further

ORDERS that all parties shall bear their own costs of court; and

ORDERS that all relief not granted herein is **DENIED**.

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[3] Michael L. Durham, P.C.'s pro rata share of the interpled funds is calculated as follows: $219,000 (Michael L. Durham, P.C.'s covered claim) / $3,050,947.95 (total covered claims) = 7.18%.

[4] Vista Chemical's pro rata share of the interpled funds is calculated as follows: $1,197,796.40 (Vista Chemical's covered claim) / $3,050,947.95 (total covered claims) = 39.26%.

[5] Third Coast Packaging's pro rata share of the interpled funds is calculated as follows: $61,750 (Third Coast Packing's covered claim) / $3,050,947.95 (total covered claims) = 2.02%.

[6] Oxid, Inc.'s pro rata share of the interpled funds is calculated as follows: $27,200 (Oxid, Inc.'s covered claim) / $3,050,947.95 (total covered claims) = 0.89%.

[7] R.D.A. Trading, Inc.'s pro rata share of the interpled funds is calculated as follows: $76,201.55 (R.D.A. Trading, Inc.'s covered claim) / $3,050,947.95 (total covered claims) = 2.50%.

[8] Grand Lockwood Partners Limited Partnership's pro rata share of the interpled funds is calculated as follows: $379,000 (Grand Lockwood Partners Limited Partnership's covered claim) / $3,050,947.95 (total covered claims) = 12.42%.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas, this 28th of February, 1996.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARINE INDEMNITY INSURANCE COMPANY OF AMERICA,	§	
Plaintiff,	§	
vs.	§	CIVIL ACTION
	§	NO. H-94-2430
LOCKWOOD WAREHOUSE & STORAGE ET AL.,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court is United States Magistrate Judge Frances H. Stacy's Special Master's Report and Recommendation (Instrument #153) which was signed on December 29, 1995. Pursuant to several of the parties' unopposed request, the Court designated Magistrate Stacy as a Special Master on September 30, 1995 to consider the issues of the various claimants' insurable interests, calculation of damages, and priority of claims. *See* Instrument #84. Also pending before the Court is Ultra Warehouse, Inc.'s ("Ultra") Motion to Amend the Report and Recommendation of the Special Master (Instrument #156), H. Muehlstein & Company, Inc.'s ("Muehlstein") Motion to Amend the Report and Recommendation of the Special Master (Instrument #159), Grand Lockwood Partners Limited Partnership's ("Lockwood Partners") Motion to Amend the Special Master's Report and Recommendation (Instrument #164), Lockwood Partners' Motion to Reform the Recommendation (Instrument #165), and various parties' objections to the Report and Recommendation. In response to the various filings, Magis-

2. Grand Lockwood Partners Limited Partnership leased the Lockwood warehouse to Lockwood Warehouse & Storage pursuant to a written lease agreement dated, January 1, 1993. Exhibit "A" attached to Grand Lockwood Partners Limited Partnership's Brief in Support of its Claim in Interpleader.

3. Lockwood Warehouse & Storage ("Lockwood") was in the business of operating a warehouse and storing the property of others. Exhibit "A" at 3, attached to Grand Lockwood Partners Limited Partnership's Brief in Support of its Claim in Interpleader.

4. A fire destroyed the Lockwood warehouse and all its contents on November 8, 1993. Affidavit of Martin C. Leibowitz, attached to Grand Lockwood Partners Limited Partnership's Brief in Support of its Claim in Interpleader.

5. Reclaimed industrial canning equipment, valued at $66,750, which was being stored by Third Coast Packaging, was destroyed in the Lockwood warehouse fire. Affidavit of David Richards & Lockwood Warehouse and Storage invoices, both attached to Third Coast Packaging's Brief.

6. Third Coast Packaging did not have insurance that covered its losses from the Lockwood warehouse fire. Affidavit of Larry Ramsay. Third Coast Packaging's losses of $66,750 have been entirely uncompensated.

7. Swedish pine lumber, valued at $33,322.60, including transportation and storage costs, which was being stored in the warehouse by The Fritz Companies, Inc. for Snavley Forest Products, Inc., was destroyed in the Lockwood warehouse fire. Affidavit of Berlin Edward, attached to The Fritz Companies/Snavely Forest Products' Brief.

8. Snavley Forest Products, Inc. had its own insurance with Northbrook Property and Casualty Company on the lumber it had stored in the Lockwood warehouse. Affidavit of Ed Arguello. That insurer paid Snavley $29,000 for its loss, leaving Snavley

with an uncompensated loss of $4,322.60. Affidavit of Ed Arguello.

9. Medical supplies, which were being stored in the Lockwood warehouse by Michael L. Durham, P.C., were destroyed in the Lockwood warehouse fire. Deposition of Michael Durham, at 13-14, attached as Exhibit "A" to the Affidavit of Paul J. Coselli.

10. Michael L. Durham, P.C.'s medical supplies were purchased by Michael L. Durham, P.C. from a bankruptcy sale in October 1991 for $187,000. Deposition of Michael Durham, at 17, attached as Exhibit "A" to the Affidavit of Paul J. Coselli.

11. At the time of the fire, Michael L. Durham, P.C. had a written contract for the sale of the medical supplies with Marshall Davis d/b/a Maheda. Under that contract, Marshall Davis d/b/a Maheda was to pay Michael L. Durham, P.C. $450,000 in cash. Deposition of Michael L. Durham at 26 & Agreement for Sale and Purchase of Medical Supplies, attached as Exhibit "A" to the Affidavit of Paul J. Coselli.

12. Michael L. Durham, P.C. took a $224,000 tax loss on the medical supplies in 1993. Deposition of Michael L. Durham at 47-48, attached as Exhibit "A" to the Affidavit of Paul J. Coselli.

13. Lockwood represented to Michael L. Durham, P.C. that it had insurance on the contents of the warehouse. Deposition of Michael Durham at 39, attached as Exhibit "A" to the Affidavit of Paul J. Coselli.

14. Michael L. Durham, P.C. did not have insurance of its own on the medical supplies that were destroyed in the Lockwood warehouse fire. Deposition of Michael L. Durham at 39, attached as Exhibit "A" to the Affidavit of Paul J. Coselli. Michael L. Durham, P.C. is thus uncompensated to the full extent of its $450,000 property loss claim.

15. Atactic polypropylene, a plastic polymer product, which had a purchase or manufacturing cost of $493,873.58, and which was being stored in the Lockwood warehouse by IGI Baychem,

Inc., was destroyed in the Lockwood warehouse fire. Deposition of Larry A. Elrod at 16-18, and Deposition of Gene G. McNally at 31-35, attached as Exhibits "D" and "E", respectively, to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

16. IGI Baychem had a written agreement with Shaft Warehouse and Storage, the predecessor in interest of Lockwood Warehouse and Storage, for the storage, packaging and shipping of its goods. Exhibit "A" attached to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

17. In the agreement between IGI Baychem and Shaft, Shaft was given "full charge and responsibility" for the storage, packaging and shipping of IGI Baychem's goods. Exhibit "A" at 7.1, attached to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds. Additionally, in the agreement, Shaft agreed to "maintain all hazard insurance on the product stored with Shaft." Exhibit "A" at 7.2, attached to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

18. IGI Baychem had property damage insurance with American Home Assurance Company which covered some of IGI Baychem's loss. Affidavit of Gene G. McNally & attached proof of loss and subrogation receipt. American Home Assurance paid IGI Baychem $393,873.58 for the loss of its property in the Lockwood warehouse fire. Affidavit of Gene G. McNally & attached proof of loss and subrogation receipt. As IGI Baychem was not paid by American Home Assurance for $100,000 of its loss, the amount representing IGI Baychem's deductible under the American Home policy, IGI Baychem remains uncompensated by $100,000.

19. Drums and palletized cases of motor oil, which had a cost of $72,451.03, and which were being stored in the Lockwood warehouse by Atlantis International Commodities, Inc., were destroyed in the warehouse fire. Affidavit of Maria Carubba; Valuation Addendums, Exhibits 2 & 4 attached to Affidavit of Maria Carubba.

20. Atlantis was a named loss payee on the Marine Indemnity policy. Exhibit 1 to Affidavit of Maria Carubba.

21. Atlantis had insurance of its own to cover the losses it sustained in the Lockwood warehouse fire. Stipulation of Robert C. Oliver, attorney for Atlantis International. Thus, Atlantis has been entirely compensated for its losses of $72,451.03.

22. Chemicals, including Chemex 2139, Terol 11 and Terol 256, Pentaerythritol, Terol 170, Terol 200, OX-82, and Terol 174/256, valued at $32,200, which were being stored in the Lockwood warehouse by Oxid, Inc., were destroyed in the Lockwood warehouse fire. Affidavit of Mac L. Medlen, attached to Brief.

23. Oxid had insurance with Reliance Insurance Company with policy limits $15,000,000 and a deductible of $100,000. Supplemental Affidavit of Mac L. Medlen and attached policy. As Oxid's claim of $32,200 is less than its $100,000 insurance deductible and as Oxid does not have other insurance that would cover this loss, it is therefore uncompensated the full amount of its $32,200 claim.

24. Atactic polypropylene, valued at $81,201.55, which was being stored in the Lockwood warehouse by R.D.A. Trading, Inc., was destroyed in the Lockwood warehouse fire. Affidavit of Michael Lowenthal, attached as Exhibit "A" to Brief of R.D.A. Trading, Inc. in support of Claim for Portion of Insurance Proceeds.

25. R.D.A. Trading, Inc. had no insurance of its own to cover the loss of its property which was stored in the Lockwood warehouse. Affidavit of Michael Lowenthal Regarding Insurance

Coverage. Thus, R.D.A. Trading is uncompensated to the full extent of its claim, $81,201.55.

26. Alumina and alumina compound byproducts, valued at $1,516,396 at the time of the fire, which were being stored in the Lockwood warehouse by Vista Chemical, were destroyed in the Lockwood warehouse fire. Affidavit of Glen Telge; Testimony of Fenton at evidentiary hearing. The current fair market value of the lost alumina and alumina byproducts is approximately $1,800,000. Affidavit of Glen Telge; Testimony of Fenton at evidentiary hearing.

27. Shaft Warehouse & Storage, the predecessor in interest to Lockwood Warehouse & Storage, orally agreed to maintain insurance on any loss or damage to Vista Chemical's property stored at the Lockwood warehouse. Affidavit of Glen Telge.

28. Vista Chemical had some insurance of its own on the property that was lost in the Lockwood warehouse fire. Affidavit of David Marshall. Vista Chemical recovered $309,837.60 from its insurers, leaving an uncompensated loss of $1,202,796.40. Affidavit of David Marshall.

29. Coffee, valued at $6,994,355, which was being stored in the Lockwood warehouse by Kraft General Foods, Inc., parent company of Maxwell House Coffee Company, was destroyed in the Lockwood warehouse fire. Final Statement of Loss, attached to Exhibit "A" of Kraft's Brief Regarding its Right to Recover the Funds Interplead by Marine Indemnity.

30. Kraft General Foods sustained business interruption damages of $786,117, extra expenses of $76,804, and loss of machinery and equipment valued at $406,889 as a result of the Lockwood warehouse fire. Final Statement of Loss, attached to Exhibit "A" of Kraft's Brief Regarding its Right to Recover the Funds Interplead by Marine Indemnity.

31. Maxwell House Coffee Company, a division of Kraft General Foods, Inc., had written agreements with Shaft Warehouse & Storage, the predecessor in interest to Lockwood Ware-

house & Storage, for the storage, blending and packaging of coffee. Exhibits "A" & "B" to Brief; Deposition of Roger E. Stuart at 8, Exhibit "H", attached to Kraft's Brief Regarding its Right to Recover the Funds Interplead by Marine Indemnity.

32. In the agreement between Maxwell House Coffee Company and Shaft Warehouse & Storage dated April 10, 1990, Shaft agreed to provide Maxwell House with a "certificate of insurance as verification" of warehouseman's liability coverage. Exhibit "A" attached to Kraft's Brief Regarding its Right to Recover the Funds Interplead by Marine Indemnity.

33. In the agreement between Maxwell House Coffee Company and Shaft Warehouse & Storage dated April 25, 1991, Shaft agreed to provide Maxwell House with "certificates of insurance from Shaft's insurer" evidencing "property damage liability limits of not less than $1,000,000 per occurrence." Exhibit "B" attached to Kraft's Brief Regarding its Right to Recover the Funds Interplead by Marine Indemnity.

34. Kraft General Foods had other insurance which covered all but $1,000,000 of its losses in the fire. Affidavit of Don W. Davidson; Affidavit of David E. Heiber. The $1,000,000 which was not covered by other insurance represents Kraft's deductible under its other insurance. Deposition of Rajat Bahri at 16, Exhibit "G" to Brief. To the extent Kraft was not paid by its own insurance companies for $1,000,000 of its loss, Kraft is uncompensated in the amount of $1,000,000.

35. Office and warehouse equipment, valued at $8797.10, and belonging to Ultra Warehouse, Inc., was destroyed in the Lockwood warehouse fire. Affidavit of Ruth L. Heater at 2-3, attached as Exhibit "C" to Ultra Warehouse & Storage, Inc.'s Brief in Support of Damages.

36. As a result of the fire, Ultra Warehouse lost $15,811.73 in lost rent, and was forced to pay higher rent for warehouse space in another warehouse. Affidavit of Ruth L. Heater at 2-3, attached

as Exhibit "C" to Ultra Warehouse & Storage, Inc.'s Brief in Support of Damages.

37. Ultra Warehouse, Inc. entered into a written sublease agreement with Lockwood Warehouse & Storage dated June 15, 1993. There was no provision whatsoever for insurance in that agreement. Exhibit "A" to Affidavit of Del Heater. Ultra, in turn, entered into written warehouse contracts with Simpson Paper and H. Muelstein & Co., Inc. for the storage of their goods in the Lockwood warehouse. Exhibits "B" and "C" to Ultra Warehouse & Storage, Inc.'s Brief in Support of Damages.

38. Ultra Warehouse did not have insurance on the goods it stored in the Lockwood warehouse or the equipment that was in the Lockwood warehouse at the time of the fire. Supplementary Affidavit of Del Heater. Thus, Ultra is uncompensated in the amount of the full extent of its loss.

39. Dishes and dinnerware, which were being stored in the Lockwood warehouse by The Fritz Companies for Citation Sales & Marketing, Inc., were destroyed in the Lockwood warehouse fire. Exhibit "N" to Brief; Deposition of Patricia Upchurch.

40. The replacement value of the dishes and dinnerware destroyed by the fire was $203,532.29, Exhibit "N", attached to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

41. Citation Sales & Marketing had insurance with Home Indemnity on the goods it stored in the Lockwood warehouse. Its deductible under that insurance was $1000. Exhibit "N," attached to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds; Exhibit "A" to Citation Sales & Marketing's Supplemental Brief Regarding Extent of Uninsured Loss. Thus, Citation Sales & Marketing is uncompensated in the amount of $1,000.

42. Paper, valued at $310,072.15, which was being stored in the Lockwood warehouse by Custom Form Transportation Systems, was destroyed in the Lockwood warehouse fire. Exhibit "J" to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

43. As a result of the fire, Custom Form Transportation suffered equipment losses of $17,430, and business interruption losses of $96,981.59. Exhibit "K" to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

44. Custom Form Transportation Systems entered into a written lease agreement with Shaft Warehouse & Storage dated April 2, 1991. Under that lease, Custom Form agreed to "keep and maintain, with insurance carriers and in the form acceptable to [Shaft], comprehensive general liability insurance applying to the activities of [Custom Form], and in connection with, the Premises, with limits of liability not less than $ [1] hereinabove for injury to or death of one or more persons or property damage." Exhibit "F" to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

45. Custom Form Transportation Systems entered into a written sublease agreement with Lockwood Warehouse & Storage dated June 15, 1993. There was no provision for insurance in that agreement. Exhibit "F" to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds.

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[1] The amount was left blank.

46. Custom Form had its own insurance with Fidelity & Casualty of New York on the paper and equipment it stored in the Lockwood warehouse. Affidavit of James D. Vaughn & attachments. It was paid the limits of its property damage liability policy, $300,000, for the paper that was destroyed in the fire. Affidavit of James D. Vaughn & attachments. Additionally, Custom Form was paid $16,430 for the loss of its equipment. Affidavit of James D. Vaughn & attachments; Exhibits "I" and "J", attached to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages & Priority of Claims to Interplead Funds. Custom Form was not paid $1000 of its claimed equipment loss, that amount representing the deductible for equipment losses under the policy. Affidavit of James D. Vaughn & attachments. Additionally, Custom Form was not paid $10,072.15 of its property loss claim, that amount representing its damages in excess of the $300,000 policy limits. Affidavit of James D. Vaughn & attachments. Finally, Custom Form was not paid $96,981.59 for its business interruption losses, such damages not being covered by the Fidelity & Casualty policy. Affidavit of James D. Vaughn & attachments. In total, Custom Form was uncompensated in the amount of $108,053.74.

47. Paper, valued at $5,359,844 (inclusive of storage warehousing expenses, overtime charges, and bill of lading charges), which was being stored in the Lockwood warehouse by Simpson Paper Company, was destroyed in the Lockwood warehouse fire. Affidavit of John Ronan.

48. Simpson Paper Company had a written storage agreement with Ultra Warehouse, Inc., for the storage of its paper in the Lockwood warehouse. That agreement provided that "Goods are not insured by warehouseman [Ultra] against loss or damage however caused." Exhibit "B" to Ultra Warehouse & Storage, Inc.'s Brief in Support of Damages; Affidavit of Dennis Hollander.

49. Simpson Paper was paid $5,251,054 by its own insurance company, Arkwright Mutual Insurance Company, for its property losses. Affidavit of John Ronan. The remaining $108,790 is the amount for which Simpson was not compensated.

50. Packaged plastic materials, with a cost of $347,346.63, which were being stored in the Lockwood warehouse by H. Muelstein & Co., Inc., were destroyed in the Lockwood warehouse fire. Affidavit of Martin Zielonka. The net sales value of the lost packaged plastic materials was $1,078,233. Affidavit of Gary Markelon, attached to H. Muelstein & Company's Brief on the Issue of Priority of Claims.

51. H. Muelstein & Co., Inc. had a written storage agreement with Ultra Warehouse, Inc., for the storage of its plastic products in the Lockwood warehouse. That agreement provided that "Goods are not insured by warehouseman [Ultra] against loss or damage however caused." Exhibit "C" to Ultra Warehouse & Storage, Inc.'s Brief in Support of Damages.

52. H. Muelstein was paid $750,000 by its own insurance company, Phoenix Assurance Company of New York, the policy limits of the insurance less a $1000 deductible, for Muelstein's losses in the fire. Affidavit of Gary Markelon, attached to H. Muelstein & Company's Brief on the Issue of Priority of Claims. Given that H. Muelstein was paid in excess of the cost or cash value of its property by its own insurer, H. Muelstein has been fully compensated for the actual cash value of the property it lost.

53. Rubber products, with a fair market value of $339,445, which were being stored in the Lockwood warehouse by Enterplast, Inc., were destroyed in the Lockwood warehouse fire. Affidavit of Frederick Tedori, Jr.

54. Lance Cowan d/b/a Shippers International had a written sublease agreement with Lockwood dated August 1, 1993. Exhibit "E" to Enterplast, Inc.'s Supplemental Brief in Support of Recovery of Insurance Proceeds under Marine Indemnity Policy

Number Y-ITF941467. Enterplast, Inc. had an oral storage agreement with Lance Cowan d/b/a Shippers, International for the storage of its rubber products in the Lockwood warehouse. Affidavit of Frederick Tedori, Jr.

55. Enterplast. Inc. had its own insurance on the goods it stored in the Lockwood warehouse with Intercargo Insurance Company. Affidavit of Sheila Skipper. Enterplast submitted a claim of $370,502 to Intercargo for the loss of its goods in the fire. Affidavit of Sheila Skipper. Intercargo paid Enterplast $347,911.49 for the losses it sustained in the Lockwood warehouse fire. Affidavit of Sheila Skipper. To the extent Enterplast was paid by Intercargo in excess of the fair market value of the goods Enterplast lost, Enterplast has been fully compensated for the actual cash value of its property.

56. After the fire that destroyed the Lockwood warehouse, Grand Lockwood Partners Limited Partnership expended in excess of $384,000 to remove debris and clean up the site of the Lockwood warehouse fire. Affidavit of Martin C. Leibowitz, attached as Exhibit "A" to Grand Lockwood Partners Limited Partnership's Brief in Support of its Claim in Interpleader.

57. Grand Lockwood Partners Limited Partnership did not have insurance which covered the costs it incurred in removing debris and cleaning up the site of the Lockwood warehouse fire. Affidavit of Stephen Lawrence.

58. Marine Indemnity paid Lockwood $56,390, for the loss of Lockwood's betterments and improvements on the Lockwood warehouse. That amount represented the lost value of the betterments and improvements less the $5,000 deductible under the policy.

59. For all those who stored property in the warehouse, Lockwood provided fire protection, building security, maintenance, and housekeeping. Lockwood also provided tenants with access to the warehouse when repairs and maintenance were necessary. Affidavit of John Ronan at 3-4; Affidavit of Del Heater at 2-3.

60. Lockwood had an office in the warehouse, over which it had complete control and where one of its representatives worked during normal business hours. Affidavit of John Ronan at 3-4.

61. Lockwood maintained control over all common areas in the warehouse, including the hallways and loading dock. Affidavit of John Ronan at 3-4.

62. All repairs, maintenance or housekeeping matters related to the warehouse were referred to Lockwood for action. Affidavit of John Ronan at 3-4.

63. Lockwood provided and paid for all utilities at the warehouse. Affidavit of Del Heater at 2.

64. Lockwood's employees had access to all areas in the warehouse and could enter areas in the warehouse which were leased to others in order to make repairs or do maintenance. Affidavit of Del Heater at 2-3.

65. Lockwood conducted periodic general inspections of the entire warehouse. Affidavit of Del Heater at 4.

VI. CONCLUSIONS OF LAW ON INSURABLE INTEREST

With respect to each Defendant's insurable interest under the Marine Indemnity policy, the central issues for resolution are whether each Defendant's claim falls within the coverage provided by the policy and whether such claim is excluded or limited by any other provision of the policy. In that regard, the Master, using the foregoing findings of fact, makes the following conclusions of law on the insurable interest issue.

An interpleader action, available at common law and by statute, 28 U.S.C. § 1335, allows a party who concedes liability to have conflicting claims against it resolved in one forum. *Illinois Employers Ins. v. Mihalcik*, 801 F.2d 949, 951 n.3 (7th Cir. 1986), *cert. denied.*, 479 U.S. 1087 (1987); *Financial Guaranty Ins. Co. v. Fayetteville*, 749 F. Supp. 934, 943 (W.D. Ark. 1990),

aff'd, 943 F.2d 925 (8th. Cir. 1991). It is a mechanism used when two or more persons claim an interest in a definite and identifiable fund and when the claims to the fund risk exceeding the total value of the fund. *In re Joint Eastern & Southern Districts Asbestos Litigation,* 120 B.R. 648, 657 (E.D. N.Y. 1990). The prerequisites to an interpleader action include, the deposit of money, property or a bond with the court, *Gardes Directional Drilling v. U.S. Turnkey Exploration, Inc.,* 815 F. Supp. 956, 961 (W.D. La. 1993), and the existence of a single, identifiable fund to which there are conflicting claims of entitlement. *Wausau Insurance Companies v. Gifford,* 954 F.2d 1098, 1100 (5th Cir. 1992). Conflicting claims to insurance proceeds provide an ideal situation for an interpleader action. *See e.g. Daniels v. Equitable Life Assurance Society of the United States,* 35 F.3d 210 (5th Cir. 1994).

Interpleader, whether instituted under common law or by statute, is a proceeding in equity. *Great American Ins. Co. v. Spraycraft, Inc.,* 844 F. Supp. 1188, 1191 (S.D. Ohio 1994); *Truck-a-Tune, Inc. v. Re,* 856 F. Supp. 77, 80 (D. Conn. 1993), *aff'd, sanctions disallowed,* 23 F. 60 (2nd Cir. 1994); *In re Continental Airlines Corp.,* 60 B.R. 472, 476 (S.D. Tex. 1986). Although equitable in nature, a determination on the proper distribution of interpled funds must be based on the law. *Prudential Ins. Co. v. Neal,* 768 F. Supp. 195, 200 (W.D. Tex. 1991); *Fidelity & Deposit Co. v. McKinney,* 1993 W.L. 43616 (E.D. La. 1993). When the interpled funds arise by virtue of a contract, a determination on the proper distribution of such funds must be in accord with the contract that created the fund. *Gross v. Connecticut General Life Ins. Co.,* 390 S.W.2d 388, 390 (Tex. Civ. App. — El Paso 1965, no writ). Similarly, in interpleader cases which are based on insurance proceeds, a determination on the proper distribution of such proceeds must conform with the terms of the insurance policy from which the insurance proceeds arose. *Id.* (holding "[o]rdinarily in all contracts, including those in the insurance field, the insured is entitled to recover only under and by the terms of the contract itself"). Given that this interpleader

case is based on insurance proceeds, the resolution of the issues presented in this action must be based primarily on the provisions of the insurance policy at issue and secondarily on considerations of equity.

In an interpleader action, each party claiming entitlement to the interpled funds has the burden of proof by a preponderance of the evidence to show its entitlement to the funds. *In re the Kelly Group,* 159 B.R. 472, 476 (W.D. Va. 1993); *Midland Ins. Co. v. Friedgood,* 577 F. Supp. 1407, 1411 (S.D. N.Y. 1984). If that burden is not met, that claimant is generally not entitled to any share in the interpled funds. If there is a general lack of evidence from which the court can determine the proper entitlement to the interpled funds, the court may, using equitable considerations, distribute the funds on a pro rata basis among all the claimants. *See e.g., Farmers Ins. Co., Inc. v. Personal Representative of Mitchell,* 755 F. Supp. 255 (W.D. Ark. 1989).

In the instant interpleader action, coverage under an insurance contract is at issue. The claimants dispute not only who is covered by the insurance policy, but also the proper distribution and order by which each claimant should be paid from the proceeds of the policy. With regard to each claimant's coverage under the policy, the Marine Indemnity policy provides coverage for:

> (A) Personal property of the Insured pertaining to the conduct of the Insured's business.
>
> (B) Personal property of others which is directly connected with the Insured's business while in the care, custody or control of the Insured, and for which the Insured is responsible, or for which the Insured has agreed in writing prior to the loss to insure.
>
> (C) Real property of the Insured.
>
> (D) To the extent of the Insured's business interests only, improvements and betterments to buildings occupied, but not owned by the Insured.

Exhibit "A" at 1, attached to Complaint for Interpleader. To be entitled to coverage under the policy for personal property destroyed in the Lockwood warehouse fire, each claimant other than Lockwood and Grand Lockwood Partners Limited Partnership must show that the property they lost was "directly connected with [Lockwood's] business while in [Lockwood's] care, custody or control." Exhibit "A" at 1, attached to Complaint for Interpleader. Those claimants must also show either that Lockwood was responsible for the property that was lost or that Lockwood agreed in writing to insure the property prior to the time the property was lost.

In interpreting the Marine Indemnity policy and the coverage provisions at issue in this case, ordinary principles of contract construction are used and the extent of coverage is "determined by the intentions of the parties as reflected by the words of the policy." *Schnabel v. Philadelphia American Life Ins. Co.,* 795 F. Supp. 816, 822 (S.D. Tex. 1992). If the policy and the coverage provisions are not ambiguous, the policy will be construed as written. *Id.* In reviewing the Marine Indemnity policy and its coverage provisions for property damage, the Master concludes that the policy is not ambiguous. The policy and its coverage provisions will therefore be construed as written, undefined and operative terms being given their ordinary and usual meaning. *Puckett v. U.S. Fire Ins. Co.,* 678 S.W.2d 936, 938 (Tex. 1984); *United States Ins. Co. v. Boyer,* 269 S.W.2d 340, 341 (Tex. 1954). Although case law may give some insight into the legal or technical definition of operative terms contained in the coverage provisions of the Marine Indemnity policy, the legal or technical definition does not control; the plain, ordinary and generally accepted meanings of the terms do. *Ramsay v. Maryland American General Ins. Co.,* 533 S.W.2d 344, 346 (Tex. 1976) ("When terms of an insurance policy are unambiguous, they are to be given their plain, ordinary, and generally accepted meaning unless the instrument itself shows that the terms have been used in a technical or different sense."); *See also Garrison v. Fielding Reinsurance, Inc.,* 765 S.W.2d 536, 538 (Tex. App. — Dallas

1989, writ denied); *Entzminger v. Provident Life & Accident Ins. Co.*, 652 S.W.2d 533 (Tex. App. — Houston [1st Dist.] 1983, no writ).

The operative terms in the property damage coverage provisions of the Marine Indemnity policy include, "care," "custody," "control," and "responsible." These terms are not defined by the policy and will therefore be given their plain and ordinary meaning. Webster's Dictionary defines these terms as follows:

> Care: charge, supervision, management; responsibility for or attention to safety and wellbeing . . .
>
> Custody: the act or duty of guarding and preserving; safekeeping: protection, care, maintenance . . .
>
> Control: To have power over; power or authority to guide or manage . . .
>
> Responsible: answerable, accountable, amenable, liable . . .

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981).

As the policy coverage language refers to care, custody *or* control in the disjunctive, the claimants need only show that their property was in Lockwood's care, Lockwood's custody or Lockwood's control. They need not prove all three elements of care, custody and control. *See Wood v. Paulus*, 524 S.W.2d 749, 756 (Tex. Civ. App. — Corpus Christi 1975, writ ref'd n.r.e.); *Board of Insurance Commissioners v. Guardian Life Ins. Co.*, 180 S.W.2d 906, 908 (Tex. 1944).

A. The property of Kraft General Foods, Inc., IGI Baychem, and Atlantis, International, which was lost in the warehouse fire, was property that was "directly connected with [Lockwood's] business while in [Lockwood's] care, custody or control" and was property that Lockwood agreed in writing to insure prior to the time in which the property was lost.

Those who had an agreement with Lockwood for the storage of their property and a written agreement that Lockwood was to insure their property are covered by the property damage provisions of the Marine Indemnity policy. These claimants include Kraft General Foods, Inc., IGI Baychem, Inc., and Atlantis, International.

1. Kraft General Foods, Inc.

Kraft's submissions show that Kraft stored coffee in the Lockwood warehouse under written storage, blending and packaging agreements. Those agreements evidence the first coverage requirement, that Kraft, in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody or control. Those agreements also evidence the second coverage requirement, that Lockwood agreed in writing to insure Kraft's property prior to the time Kraft sustained its loss.

2. IGI Baychem

IGI Baychem's submissions show that IGI Baychem stored atactic polypropylene, a plastic polymer product, in the Lockwood warehouse under a written storage, packaging and shipping agreement. That agreement evidences the first coverage requirement, that IGI Baychem, in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody or control. That agreement also evidences the second coverage requirement, that Lockwood agreed in writing to insure IGI Baychem's property prior to the time IGI Baychem sustained its loss.

3. Atlantis International

Atlantis' submissions, including the deposition excerpts of James A. Longuet, wherein he admits that Lockwood stored Atlantis' drums and palletized cases of motor oil, evidence the first coverage requirement, that Atlantis, in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody or control. The "evidence of insurance" submitted by Atlantis, wherein Atlantis was named as a loss payee on the Marine Indemnity policy, Exhibit 1 to Affidavit of Maria Carubba, establishes the second coverage requirement, that Lockwood agreed in writing to insure Atlantis' property prior to the time Atlantis sustained its loss.

B. The property of Michael L. Durham, P.C., Vista Chemical, Third Coast Packaging, The Frit Companies/ Snavley Forest Products, Inc., Oxid, Inc., and R.D.A. Trading, which was lost in the warehouse fire, was property that was "directly connected with [Lockwood's] business while in [Lockwood's] care, custody or control" and was property for which Lockwood was "responsible."

Those who had an oral agreement with Lockwood for the storage of their property in the Lockwood warehouse are covered by the property damage provisions of the Marine Indemnity policy. These claimants include Michael L. Durham, P.C., Vista Chemical, Third Coast Packaging, The Fritz Companies/Snavley Forest Products, Inc., Oxid, Inc., and R.D.A. Trading. In determining that Lockwood was "responsible" for the property of Michael L. Durham, P.C., Vista Chemical, Third Coast Packaging, The Fritz Companies/Snavley Forest Products, Inc., Oxid, Inc., and R.D.A. Trading, a distinction is drawn between leases and bailments. Correctly characterizing each claimant's relationship with Lockwood as either a lease or bailment is essential because the legal duties and responsibilities associated with a bailment are different from the legal duties and responsibilities associated with a lease. These legal duties and responsibilities, in

turn, provide evidence as to whether Lockwood was "responsible" within the meaning of the Marine Indemnity policy for the property of each claimant.

Under Texas law, a bailment is created when one person delivers personal property to another in trust for a specific purpose and the other person accepts that property with the express or implied agreement that the trust will be carried out and the property returned as directed. *Braniff Airways v. Exxon Co.*, 814 F.2d 1030, 1038 (5th Cir. 1987). In contrast, a lease is "a transfer of an interest in and possession of property for a prescribed period of time in exchange for an agreed consideration called 'rent.'" *State National Bank v. United States,* 509 F.2d 832, 835 (5th Cir. 1975).

Although most claimants in this case do not specifically identify their relationship with Lockwood as a bailment or a lease, the submissions of most claimants allow the Master to determine whether a bailment or lease was created. In *Luther Transfer & Storage, Inc. v. Walton,* 296 S.W.2d 750 (Tex. 1956), the Texas Supreme Court distinguished between a warehouseman's bailment and a lease of space in a warehouse. In *Luther Transfer,* the plaintiffs

> had rented from defendant at a rate of $20 per month a compartment or locker in the basement of defendant's warehouse. The locker was used by plaintiffs to store men's suits and other articles of merchandise. The door to the locker was equipped with a hasp and loop whereby it could be locked. Plaintiffs placed their lock on the locker and gave a key to the defendant, and themselves kept keys which would open the lock and afford entrance to the storage room or locker. When goods were taken to be stored in the locker, one of the plaintiffs or an agent of plaintiffs would accompany the goods to the storage space and help unload the merchandise to be stored. The defendant would send a truck for the goods, upon call from plaintiffs, and transport them to the storage locker. Also, when plaintiffs desired goods to be brought out of

> storage to their place of business, they would telephone defendant employees at the warehouse, who would take the key which they had, and unlock the locker, take out the desired articles, lock the door to the storage locker, and deliver the goods to plaintiffs' place of business.

Id. at 751-52. Based on those facts, the Texas Supreme Court concluded that the relationship between the parties "was not that of landlord and tenant, but was that of warehouseman and depositor." *Id.* at 753. Under the guidance of *Luther Transfer,* the Master concludes that an agreement to store personal property in a warehouse by a warehouseman such as Lockwood is a bailment, not a lease.

The duties and responsibilities under a bailment or a lease differ primarily in that a bailment creates a duty of care with respect to the bailed property and a lease creates a duty of care with respect to the leased premises. Under a bailment arrangement, the bailee has the duty to exercise ordinary care over the goods placed in its care. *Allright, Inc. v. Elledge,* 515 S.W.2d 266, 267 (Tex. 1974); *Ampco Auto Parks, Inc. v. Williams,* 517 S.W.2d 401, 403 (Tex. Civ. App. — Dallas 1974, writ ref'd n.r.e.); *West v. Slaughter,* 384 S.W.2d 185, 187 (Tex. Civ. App. — Waco 1964, writ ref'd n.r.e.). When a bailment is created between a warehouseman and a depositor, the same duty of ordinary care is imposed on the warehouseman (bailee) for the goods placed in his care by the depositor (bailor). *Farmers Gin Co. v. Texas Electric Ry. Co.,* 232 S.W.2d 890, 892 (Tex. Civ. App. — Waco 1950, writ ref'd n.r.e.); *Dallas v. Milum,* 200 S.W.2d 833, 836 (Tex. Civ. App. — Dallas 1947, writ ref'd n.r.e.). In contrast, under a lease arrangement, the lessor has the duty to use ordinary care in maintaining the areas under its control. *Brown. v. Frontier Theatres, Inc.,* 369 S.W.2d 299, 302 (Tex. 1963); *Jones v. Houston Aristocrat Apartments, Ltd.,* 572 S.W.2d 1 (Tex. Civ. App. — Houston [1st Dist] 1978, writ ref'd n.r.e.). It also has the duty to exercise ordinary care over the premises under its control for the safety of its tenants and their

guests. *Taylor v. Gilbert Gertner Enterprises,* 466 S.W.2d 337, 341 (Tex. Civ. App. — Houston [1st Dist.] 1971, writ ref'd n.r.e.).[2]

1. Michael L. Durham, P.C.

Michael L. Durham, P.C.s' submissions, including the Lockwood invoices for the storage of Durham's medical supplies, evidence the first coverage requirement, that Michael L. Durham, P.C., in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody and control. The bailor-bailee relationship created by this storage arrangement and Lockwood's oral representations that it had insurance which covered the property of Michael L. Durham, P.C., is evidence of the second requirement, that Lockwood was responsible for the property of Michael L. Durham, P.C. Michael L. Durham, P.C. has presented uncontroverted evidence that Lockwood orally agreed to provide insurance. This evidence, in and of itself, would compel a conclusion that Lockwood was responsible for the property of Michael L. Durham in the Lockwood warehouse at the time of the loss. The existence of a warehouseman's bailor-bailee relationship between Michael L. Durham, P.C. and Lockwood, however, made Lockwood legally responsible for the property of Michael L. Durham, P.C.

Although Michael Durham characterizes the charges he paid for the storage of his goods as "rent", the relationship between Michael L. Durham, P.C. and Lockwood can only properly be classified as a warehouseman's bailment. The invoices submitted by Durham reflect monthly charges for "storage." Moreover, there is no indication that Durham received an interest in or possession of any part of the Lockwood warehouse in exchange for what he termed "rent." According to Michael Durham, he did

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[2] The findings of fact or conclusions of law set forth herein are relevant to this litigation only with respect to Lockwood's implied or inherent responsibility for the property in the Lockwood warehouse. Neither the findings of fact nor conclusions of law affect any of the claimant's rights against Lockwood for negligence.

not have a fixed and specific area in the warehouse that he could call his own. Deposition of Michael L. Durham, at 32-33, attached as Exhibit "A" to Affidavit of Paul J. Coselli. Lockwood had, in fact, moved his goods to a different location in the warehouse on two separate occasions. Deposition of Michael L. Durham, at 32-33, attached as Exhibit "A" to Affidavit of Paul J. Coselli. Because there is no evidence to indicate that Lockwood, in exchange for monthly payments, transferred an interest in the warehouse to Michael L. Durham, P.C., the Master finds that the relationship between Lockwood and Michael L. Durham, P.C. was that of bailor and bailee. Given that relationship, Lockwood was legally responsible for the property of Michael L. Durham, P.C. that was stored in the Lockwood warehouse.

2. Vista Chemical

Vista Chemical's submissions, including the Lockwood invoices for the storage of Vista Chemical's alumina and alumina byproducts evidence the first coverage requirement, that Vista Chemical, in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody and control. The warehouseman's bailor-bailee relationship created by this storage arrangement and the oral representations made by Lockwood's predecessor in interest that insurance would be provided which covered the property of Vista Chemical is evidence of the second requirement, that Lockwood was responsible for the property of Vista Chemical. In his affidavit, Glen Telge, the person in charge of Off-Site Manufacturing and Distribution for Vista Chemical, states he was told that adequate insurance would be maintained to cover any losses to the property Vista stored in the Lockwood warehouse. Affidavit of Glen Telge at 2. Given the uncontroverted nature of this evidence, and Lockwood's assumption of responsibility for Vista's property by virtue of the promise to maintain adequate insurance, Lockwood can be said to have been "responsible" for Vista's property within the meaning of the Marine Indemnity policy.

Additionally, the existence of a bailor-bailee relationship between Vista Chemical and Lockwood made Lockwood legally responsible for Vista Chemical's property. Vista Chemical does not specifically characterize its relationship with Lockwood as either a lease or bailment. Glen Telge simply states in his affidavit: "Vista contracted for the right to store materials at the warehouse in return for the payment of a monthly rental." Affidavit of Glen Telge at 2. As Telge states that Lockwood was to store its property and as Telge in no way indicates that Vista Chemical received a specific interest or right of possession in the warehouse, Vista Chemical's relationship with Lockwood can only be construed as a bailment. Given the bailment relationship, Lockwood was "responsible" for Vista Chemical's property.

3. Third Coast Packaging

Third Coast Packaging's submissions, including the Lockwood invoices for the storage of Third Coast Packaging's reclaimed industrial canning equipment evidence the first coverage requirement, that Third Coast Packaging, in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody and control. The warehouseman's bailor-bailee relationship created by this storage arrangement is evidence of the second requirement, that Lockwood was responsible for the property of Third Coast Packaging. In its submissions, Third Coast Packaging states that it dealt directly with Lockwood for the storage of its equipment. Additionally, the Lockwood invoices show that Third Coast Packaging paid Lockwood for storing its goods. As there is no evidence to indicate that Third Coast received a specific interest in or possession of the warehouse such that a lease was created, Third Coast's relationship with Lockwood can only be construed as a bailment. Given the bailment relationship, Lockwood was "responsible" for Third Coast's property.

4. The Fritz Companies/Snavley Forest Products

The Fritz Companies' submissions, including the Lockwood invoices for the storage of The Fritz Companies' Swedish pine evidence the first coverage requirement, that The Fritz Companies, in accord with Lockwood's business as a warehouse and storage facility, placed Snavley Forest Products' property in Lockwood's care, custody and control. The bailor-bailee relationship created by this storage arrangement is evidence of the second requirement, that Lockwood was responsible for the property of The Fritz Companies. In its submissions, The Fritz Companies states that it "contracted with Lockwood Warehouse & Storage for the storage of the Snavley Forest Products lumber." Affidavit of Berlin Edward at 2. Additionally, the Lockwood invoices show that The Fritz Companies paid Lockwood for the storage of Snavley Forest Products' goods. As there is no evidence to indicate that The Fritz Companies received a specific interest in or possession of the warehouse such that a lease was created, The Fritz Companies' relationship with Lockwood can only be construed as a bailment. Given the bailment relationship, Lockwood was legally "responsible" for Snavley Forest Products' property.

5. Oxid, Inc.

The submissions of Oxid, Inc., including the Lockwood invoices for the storage of Oxid's chemicals, evidence the first coverage requirement, that Oxid, in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody and control. The bailor-bailee relationship created by this storage arrangement is evidence of the second requirement, that Lockwood was responsible for the property of Oxid. In its submissions, Oxid states that its goods were stored by Lockwood in the Lockwood warehouse. Affidavit of Mac L. Medlen. Additionally, the Lockwood invoices show that Oxid paid Lockwood for storage. As there is no evidence to indicate that Oxid received a specific interest in or possession of the warehouse such that a lease was created, Oxid's relationship with Lockwood can only be construed as a bailment. Given the

bailment relationship, Lockwood was "responsible" for Oxid's property.

6. R.D.A. Trading

The submissions of R.D.A. Trading, including Lockwood invoices for the storage of R.D.A. Trading's atactic polypropylene and correspondence between R.D.A. and Lockwood evidence the first coverage requirement, that R.D.A. Trading, in accord with Lockwood's business as a warehouse and storage facility, placed its property in Lockwood's care, custody and control. The bailor-bailee relationship created by this storage arrangement is evidence of the second requirement, that Lockwood was responsible for the property of R.D.A. Trading. The correspondence submitted by R.D.A. Trading shows that Lockwood had control over the storage and release of R.D.A.'s goods and was responsible for maintaining the integrity of R.D.A.'s goods.[3] Additionally, the Lockwood invoices show that R.D.A. paid Lockwood for the storage, not for any interest in the warehouse they received. As there is no evidence to indicate that R.D.A. Trading received a specific interest in the warehouse such that a lease was created, R.D.A. Trading's relationship with Lockwood can only be construed as a bailment. Given the bailment relationship, Lockwood was "responsible" for R.D.A. Trading's property.

C. While the property of Ultra Warehouse, Inc. and Custom Form Transportation Systems, may have been to some extent in the care of Lockwood, Lockwood was not "responsible" for that property.

Those who had a written lease agreement with Lockwood for space in the warehouse are not covered by the property damage provisions of the Marine Indemnity policy. These claimants

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[3] In the correspondence, R.D.A. instructed Lockwood as follows: "Please be sure no markings are on boxes or pallets. Made in Mexico is OK. Please also shrink wrap any pallets with loose drums. " Correspondence attached Brief of R.D.A. Trading, Inc. in support of Claim for Portion of Insurance Proceeds.

include Ultra Warehouse, Inc. and Custom Form Transportation Systems.

1. Ultra Warehouse, Inc.

The submissions of Ultra Warehouse, Inc. unequivocally show that Ultra subleased space from Lockwood. The sublease agreement between Ultra and Lockwood shows that Ultra leased 10,000 square feet of space in the Lockwood warehouse for the first month of the agreement, 15,000 square feet for the second month of the agreement and 20,000 square feet of space in the third month and the months thereafter. Exhibit "A" to Ultra Warehouse & Storage, Inc.'s Brief in Support of Damages. The sublease agreement also shows that it was to incorporate all terms and conditions of the master lease between Grand Lockwood Partners Limited Partnership and Lockwood, including the provision relating to insurance. The master lease provided with respect to insurance:

> Lessor and Lessee, in their own behalf and in behalf of their insurers, each hereby waive any and all claims such party may have against the other party during the Term for any and all loss of, or damage to, any of such party's property located within or upon, or constituting a part of the Leased Premises or the Building to the extent that such loss or damage is or could have been covered by a standard Texas fire and extended coverage insurance policy, regardless of cause or origin, including the negligence (sole or otherwise), of such other party hereto.

Exhibit "A", at Article VIII, attached to Ultra Warehouse & Storage, Inc.'s Brief in Support of Damages.

> To the extent Ultra's property was in the warehouse for which Lockwood provided fire protection, building security, maintenance, and housekeeping, Ultra's property can be said to have been in Lockwood's care. However, given that the relationship between Lockwood and Ultra was a sublease and given that the sublease incorporated the insurance term of

the master lease which exonerates Lockwood and its insurers from any property damage claims, Lockwood cannot be said to have been "responsible" for Ultra's property.

As set forth above, a lessor has duties to his lessee with respect to the premises. There is no inherent or implied duty of a lessor with regard to the personal property of a lessee that is kept on the leased premises. The cases cited by certain Defendants, in which they argue that Lockwood, as a lessor, had a responsibility and a duty with respect to the property they stored in their leased space, are applicable to a lessor's responsibility and duty for the premises, not a responsibility and duty for the personal property kept on the premises. In *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978) and *Montelongo v. Goodall*, 788 S.W.2d 717 (Tex. App. — Austin 1990, no writ), Texas courts speak of the duty of ordinary care owed by the lessor to those who are on the leased premises. However, those cases make it clear that the lessor's duty flows to individuals who are on the premises and that such duty arises with respect to the maintenance of the premises. Neither of those cases deals with a lessors duty or responsibility with respect to personal property kept on the leased property by the lessee. Because Lockwood's landlord-tenant relationship with Ultra does not make it legally responsible for the personal property Ultra kept on the leased premises, and because the sublease agreement and incorporated master lease provisions make it clear that Lockwood did not assume any responsibility for the property Ultra kept on the leased premises, coverage is not available for Ultra under the Marine Indemnity policy.

2. Custom Form Transportation Systems

The submissions of Custom Form Transportation Systems, Inc. unequivocally show that Custom Form, from April 1, 1993, subleased space from Lockwood. The sublease agreement between Ultra and Lockwood shows that Ultra leased 16,320 square feet of space in the Lockwood warehouse. Exhibit "F" to IGI Baychem, Citation Sales & Marketing and Custom Form Transportation's Brief on Issues of Insurable Interest, Damages &

Priority of Claims to Interplead Funds. The sublease agreement also shows that it was to incorporate all terms and conditions of the master lease between Grand Lockwood Partners Limited Partnership and Lockwood, including the provision set forth above relating to insurance.

To the extent Custom Form's property was in the warehouse for which Lockwood provided fire protection, building security, maintenance, and housekeeping, Custom Form's property can be said to have been in Lockwood's care. However, given that the relationship between Lockwood and Custom Form was a sublease and given that the sublease incorporated the insurance term of the master lease which exonerates Lockwood and its insurers from any property damage claims, Lockwood cannot be said to have been "responsible" for Custom Form's property. Although Custom Form has submitted evidence of a previous lease it entered into with Lockwood's predecessor in interest, Shaft Warehouse & Storage, Inc., that sublease is just as specific in its disavowal of any responsibility for the property of Custom Form that was stored on the leased premises.

Because Lockwood's landlord-tenant relationship with Custom Form does not make it legally responsible for the personal property Custom Form kept on the leased premises and because the sublease agreement and incorporated master lease provisions make it clear that Lockwood did not assume any responsibility for the property Custom Form kept on the leased premises, coverage is not available for Custom Form under the Marine Indemnity policy.

D. The property of Simpson Paper Company, H. Muelstein & Co., Inc., Enterplast, Inc., and Citation Sales & Marketing which was lost in the warehouse fire, was not property that was "*directly* connected with [Lockwood's] business while in [Lockwood's] care, custody or control" and was not property for which Lockwood was "responsible."

Those who had no direct relationship with Lockwood either through a lease or bailment agreement are not covered by the property damage provisions of the Marine Indemnity policy. These claimants include Simpson Paper Company, H. Muelstein & Co., Inc., Enterplast, Inc., and. Citation Sales & Marketing, Inc.

1. Simpson Paper Company

The submissions of Simpson Paper and Ultra Warehouse show that Simpson entered into a warehouseman's contract, a type of bailment agreement, with Ultra Warehouse for the storage of its paper in the Lockwood warehouse. Although Lockwood's provision for fire protection, building security, maintenance, and housekeeping for the entire warehouse supports the conclusion that Lockwood assumed some care for all the property in the warehouse, Simpson Paper has not and cannot show that its property which was in the warehouse at the time of the fire was "directly" connected with [Lockwood's] business. Simpson Paper had no direct relationship or involvement with Lockwood. The presence of its property in the warehouse was the result of its bailment agreement with Ultra. As Simpson Paper had no direct relationship or involvement with Lockwood, its property which was lost in the fire cannot be said to have been directly connected with Lockwood's business. Thus, Simpson has not met the first coverage requirement.

Simpson also has not and cannot meet the second coverage requirement. Simpson has not shown that it had any relationship with Lockwood upon which Lockwood could have been legally responsible for Simpson Paper's property. There is no evidence

that Lockwood even knew that Simpson's property was being stored in the warehouse. Moreover, the terms of the warehouseman's agreement show that Ultra, the actual bailee of Simpson's goods, disavowed any responsibility for loss or damage to the goods, however caused. Exhibit B and C of Ultra. If, by terms of the warehouseman's agreement, Ultra, the actual bailee of the property was not responsible, Lockwood, which disavowed any responsibility for the goods of its own sublessee Ultra, See supra at IV.C.1., cannot be said to have been responsible for goods Ultra stored for others.

Because the property Simpson Paper lost in the fire was not directly connected to Lockwood's business and because there is no factual or legal basis upon which Lockwood could be found responsible for Simpson's property, coverage is not available for Simpson Paper under the Marine Indemnity policy.

2. H. Muelstein & Co., Inc.

The situation of H. Muelstein & Co. Inc. is nearly identical to that of Simpson Paper. Muelstein entered into a warehouseman's contract with Ultra Warehouse for the storage of its packaged plastic materials in the Lockwood warehouse. Lockwood's provision for fire protection, building security, maintenance, and housekeeping for the entire warehouse supports the conclusion that Lockwood assumed some care for all the property in the warehouse, including that of Muelstein. However, because Muelstein did not have a direct relationship with Lockwood, its property which was in the warehouse at the time of the fire cannot be said to have been "directly" connected with [Lockwood's] business. Thus, as with Simpson Paper, Muelstein cannot meet the first coverage requirement.

Similarly, Muelstein has not met the second coverage requirement because there is no evidence that Muelstein had any type of relationship with Lockwood upon which Lockwood could have been legally responsible for Muelstein's property. As with Simpson, Muelstein has not presented any evidence that Lockwood

knew that its property was being stored in the warehouse. Moreover, Muelstein entered into the same warehouseman's agreement with Ultra as did Simpson. If Ultra, the actual bailee of the property, was not responsible for the property, Lockwood, which had no relationship to Muelstein or Muelstein's property and which had no responsibility for the goods of its own sublessee Ultra, cannot be said to have been responsible for the goods of others that Ultra stored.

Because the property Muelstein lost in the fire was not directly connected to Lockwood's business and because there is no factual or legal basis upon which Lockwood could be found responsible for Muelstein's property, coverage is not available for H. Muelstein & Co. under the Marine Indemnity policy.

3. Enterplast, Inc.

Enterplast is in the same type of situation as Simpson Paper and Muelstein. The only real differences are that Enterplast entered into a bailment relationship with Lance Cowan d/b/a Shippers International and there was no written agreement in which the bailee disavowed responsibility for the bailor's property. As shown by the submissions of Enterplast, Lance Cowan d/b/a Shippers International entered into a sublease agreement with Lockwood dated August 1, 1993. Lance Cowan d/b/a Shippers International, in turn, orally agreed to store Enterplast's rubber products in the Lockwood warehouse.

Lockwood's provision for fire protection, building security, maintenance, and housekeeping for the entire warehouse supports the conclusion that Lockwood assumed some care for all the property in the warehouse, including that of Enterplast. However, because Enterplast did not have a direct relationship with Lockwood, its property which was in the warehouse at the time of the fire cannot be said to have been "directly" connected with Lockwood's business. Thus, Enterplast cannot meet the first coverage requirement. Similarly, Enterplast cannot meet the second coverage requirement because there is no evidence that

Lockwood was legally or factually responsible for Enterplast's property. The cases cited by Enterplast in support of its argument that Lockwood was responsible for its property apply, as discussed above, to Lockwood's responsibility for the premises, not for the personal property stored on those premises. Moreover, Enterplast's argument that Section 7.204 of the Texas Business and Commerce Code, which sets forth the duty of a warehouseman, makes Lockwood responsible for all the goods in the warehouse, is without merit. The statute provides:

> A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise would under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.

TEX. BUS. & COMM. CODE § 7.204. Given Enterplast's admission that its storage agreement was with Lance Cowan d/b/a Shipper's International, not with Lockwood, Lockwood is not bound by Section 7.204 of the Texas Business and Commerce Code and is not thereby "responsible" for Enterplast's goods.

Because the property Enterplast lost in the fire was not directly connected to Lockwood's business and because there is no factual or legal basis upon which Lockwood could be found responsible for Enterplast's property, coverage is not available for Enterplast, Inc. under the Marine Indemnity policy.

4. Citation Sales & Marketing, Inc.

Given its vague and brief submissions, the Master concludes that Citation Sales & Marketing, Inc., has not met its burden of establishing coverage under the Marine Indemnity policy. From what was submitted, the presence of Citation's property in the warehouse has not been sufficiently explained. Although there is deposition testimony that Citation's property was placed in the warehouse by The Fritz Companies, there is no evidence as to the relationship between The Fritz Companies and Lockwood with

respect to Citation's goods. Unlike the situation in which The Fritz Companies stored lumber for Snavley Forest Products, Lockwood being fully aware of the arrangement and charging the Fritz Companies for the storage of Snavely Products' lumber, Exhibit "F" to Fritz Companies, Inc. and Snavley Forest Products, Inc.'s Brief and Affidavit in Support of their Claim, there is no evidence that Lockwood was aware that Citation had goods in the warehouse. As there is no evidence that Citation's property which was in the warehouse at the time of the fire was "directly" connected with Lockwood's business and no evidence that Lockwood was either legally or factually responsible for Citation's goods, coverage is not available for Citation under the Marine Indemnity policy.

E. The clean-up and debris removal costs incurred by Grand Lockwood Partners Limited Partnership are covered by the debris removal clause of the Marine Indemnity policy

The debris removal clause in the policy provides coverage for expenses incurred in the removal of debris occasioned by loss or damage. Exhibit "A" at 6, attached to Complaint for Interpleader. As Grand Lockwood Partners Limited Partnership expended funds to clean up and remove debris following the Lockwood warehouse fire, the costs that were incurred by Grand Lockwood Partners Limited Partnership are covered by the Marine Indemnity policy.

F. Lockwood's claim for damage to property betterments and improvements is covered

Lockwood made a claim under the policy of $56,390 for damage to improvements and betterments. These losses are clearly covered under the policy as losses to "improvements and betterments to buildings occupied, but not owned by the Insured." *See supra* at IV.

VII. CONCLUSIONS OF LAW ON THE PRIORITY OF CLAIMS

As the foregoing covered claims exceed the amount of the interpled funds, the priority of coverage must be determined. The only language in the policy which can be construed as creating a priority among the claimants is the it "other insurance" clause. Under that other insurance clause, the Marine Indemnity policy was to be excess to all other available insurance. Construing the other insurance clause liberally to provide for maximum coverage, the Master concludes that those claimants who have losses which were not insured by other insurance are entitled to first priority under the policy. To the extent all uninsured claims cannot be satisfied from the interpled funds, equity dictates that those claimants, which are covered by the policy and to the extent they are uninsured, share the proceeds of the interpled funds on a pro rata basis.

The other insurance clause provides:

> If at the time of loss, or damage, there is available to a named or unnamed insured or any other interested party any other insurance which would apply in the absence of this policy, the insurance under this policy shall apply only as excess insurance over such other insurance.

Exhibit "A" at 10, attached to Complaint for Interpleader. Although an entire body of law is implicated by the other insurance clause,[4] which in many cases conflicts with the other insurance clauses in the other insurance policies held many claimants, that body of law is not controlling in this proceeding. First, there is no Texas case law which addresses the situation

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[4] The leading cases in Texas on conflicting other insurance clauses are: *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583 (Tex. 1969); *Liberty Mut. Ins. Co. v. U.S. Fire Ins. Co.*, 590 S.W.2d 783 (Tex. Civ. App. — Houston [14th Dist.] 1979, writ ref'd n.r.e.); *Carrabba v. Employers Casualty Co.*, 742 S.W.2d 709 (Tex. App. — Houston [14th Dist.] 1987, no writ); and *Utica Nat'l Ins. Co. v. Fidelity Casualty Co.*, 812 S.W.2d 656, 662 (Tex. App. — Dallas 1991, writ denied).

presented herein, that of numerous insurance claimants vying for payment under a policy with limited funds available. Second, in most instances, the claimants to other insurance were paid for their property damage without regard to the apparent conflicts between the other insurance clauses. Third, the potential for some claimants to experience a windfall upon the application of Texas law regarding conflicting other insurance clauses, goes against the equitable considerations upon which this interpleader action is based. For these reasons and the additional reason that the uninsured claims of those claimants who are covered under the Marine Indemnity policy exceed the funds available, conflicts among other insurance clauses will not be considered.

While the Marine Indemnity policy itself suggests the solution of the priority issues to be resolved herein, the alternate theories for priority are deserving of discussion. The second such theory, that those with written agreements for insurance should have priority over those with oral agreements for insurance and those without any agreement regarding insurance, is not supported by the insurance policy language or Texas case law. The third priority theory, advanced by some Defendants, that those with agreements for insurance should have priority over those without any agreement for insurance, suffers from the same lack of support in either the insurance policy or Texas case law. The cases cited by various Defendants in support of the second and third theory, *Tillerson v. Highrabedian,* 503 S.W.2d 398 (Tex. Civ. App. — Houston [14th Dist.] 1973, writ ref'd n.r.e.) and *Farmers Ins. Exchange v. Nelson,* 479 S.W.2d 717 (Tex. Civ. App. — Waco 1972, writ ref'd n.r.e.), are neither applicable nor controlling.

In *Tillerson,* the plaintiff entered into a construction contract with Defendant, in which Defendant was to construct Plaintiff's residence. The parties agreed that the plaintiff was to acquire builder's risk insurance, which was to protect the plaintiff, the defendant, and the bank which was financing the project. Plaintiff acquired builder's risk insurance, but only named himself as an

insured. The house was nearly completed when it was destroyed by fire. When plaintiff collected all the insurance proceeds, Defendant moved to have the insurance policy reformed to name him as an additional insured. After determining that Defendant had an insurable interest in the construction project, the Texas Court of Appeals set forth the law on the issue:

> When one of two parties, each of whom has an insurable interest in a particular property, agrees to get insurance for the protection of both interests, but does, in fact, procure a policy naming only himself as insured, and the property is damaged or destroyed, the other party, as between the two, is entitled to the proceeds of the policy up to the extent of his loss.

Tillerson, 503 S.W.2d at 400. In *Farmers,* a building and its contents were leased by Charles D. Nelson to Meredith Twomey, who used the building as a restaurant. Pursuant to the lease agreement, Twomey agreed to procure insurance on the building and its contents, naming the owner of the building as an additional insured. Insurance was acquired on the building but the lessor, Charles Nelson, was not named as an additional insured. When the building and its contents were destroyed by fire, Twomey, who moved her belongings out of the building prior to the fire, did not attempt to recover under the policy. Although the owner of the building tried to recover under the policy, the insurance company denied his claim, maintaining that because he was not listed as an insured under the policy he could not recover. In determining that the owner of the building could recover under the policy the Texas Court of Appeals stated:

> We hold that a breach by a lessee of a contract to insure the leased property for the benefit of his lessor will charge the benefits of any insurance taken out by the lessee on the property with a lien in favor of the lessor; and that the lessor may proceed directly against the insurer to provide his pro rata share of any funds payable under the policy.

Farmers, 479 S.W.2d at 721.

These cases are neither applicable nor controlling for three reasons. First, these cases deal with the priority of claims between a party who has agreed to acquire insurance and a party for whose benefit the insurance was to be acquired. In the instant case, the priority issue is based on conflicting claims between multiple parties all of whom were to benefit from the insurance that was to be acquired by Lockwood. Thus, neither *Tillerson* nor *Farmers* speaks to the priority issues before the Court in this case. Second, in *Tillerson* and *Farmers,* the fundamental issue was whether a party who was not named as an additional insured on an insurance policy was covered by the policy. In the instant case, the Marine Indemnity policy specifically extended coverage to those who were not named as additional insureds by providing coverage for those who lost property that was directly connected with Lockwood's business while in Lockwood's care, custody and control and for which Lockwood was responsible or had agreed in writing to insure. Third and finally, in *Tillerson* and *Farmers,* the insurance that was acquired covered all losses claimed by those with insurable interests. In the instant case, however, there is admittedly not enough insurance to satisfy the claims of those with an insurable interest. Because neither *Tillerson* nor *Farmers* dealt with the priority of claims in a situation in which the available insurance was not sufficient to satisfy all the valid claims, those cases cannot control the resolution of this dispute. Moreover, given the facts and holdings of *Tillerson* and *Farmers,* Defendants' arguments that these cases compel an award of priority to those who had agreements with Lockwood for insurance coverage are without merit.

Although a resolution of this interpleader action is to be determined, to the extent possible, by the policy language or controlling law, equitable considerations may guide the Court in determining the proper distribution of the funds at issue in this case. In reliance on the policy language regarding other insurance and considerations of equity, the Master concludes that the

distribution of the interpled funds should be on a pro rata basis among the claimants who were uninsured to any degree.

With respect to the arguments that Grand Lockwood Partners Limited Partnership should not receive any share in the interpled funds or should have last priority, as a result of allegations that its negligence caused or contributed to the warehouse fire under an unclean hands theory, the Master finds that this is not the appropriate forum for litigating the issue of the Partnership's negligence. As there are cases pending in state court against the Partnership, issues of negligence should be resolved in those courts. At issue in this case is coverage under the policy and distribution of the interpled insurance policy proceeds. With respect to those issues, the Partnership has shown itself to be both covered by the Marine Indemnity policy, and uninsured. Thus, the Partnership, under the terms of the policy itself, is entitled to share in the insurance policy proceeds.

With respect to the arguments that Lockwood Warehouse and Storage should be required to return the $56,390 which it was paid for its betterment and improvement losses, also under an unclean hands theory, the Master also concludes that this forum, for the reasons set forth above, is not appropriate for litigating the issue of Lockwood's negligence. Moreover, even if this were an appropriate forum, the Order dismissing Lockwood from this action has prevented Lockwood from defending itself against the unclean hands allegations and claims. To the extent Lockwood's losses were covered by the Marine Indemnity policy and to the extent the Court has already approved of the distribution of funds Lockwood received, Lockwood will not be required to return any of the funds it received from Marine Indemnity.

VIII. CONCLUSIONS OF LAW ON CALCULATION OF DAMAGES

The calculation of damages for each claimant found to be covered by the Marine Indemnity policy is based on the terms of the policy. Relevant to the calculation of damages is the measure

of value set forth in the policy as "actual cash value" for property losses, the policy's explicit exclusion of economic losses, including, "delay, loss of market, loss of use; interruption of business," and the policy's $5,000 deductible for each claim made.

1. Kraft General Foods, Inc.

Of Kraft's $8,264,165 loss, $786,117 was loss associated with Kraft's business interruption, and $76,804 was loss associated with additional expenses, including transportation and storage charges. Both of those losses were covered by Kraft's other insurance, leaving Kraft with a $1,000,000 loss representative of its deductible under its other insurance policies. Taking into account the $5,000 deductible under the Marine Indemnity policy, Kraft General Foods' damages are $995,000.

2. IGI Baychem

Of IGI Baychem's $493,873.58 loss, $393,873.58 was covered IGI Baychem's other insurance, with the remaining $100,000 in loss representing the deductible under IGI Baychem's other insurance. Taking into account the $5,000 deductible under the Marine Indemnity policy, IGI Baychem's damages are $95,000.

3. Atlantis International

All of Atlantis International's $72,451.03 loss was covered by insurance other than the Marine Indemnity insurance. Thus, Atlantis International has no compensable damages.

4. Michael L. Durham, P.C.

Michael L. Durham, P.C. claims a loss of $450,000, none of which was covered by insurance. The basis of that loss figure is a contract between Michael L. Durham, P.C. and Marshall Davis d/b/a Maheda in which Marshall Davis d/b/a Maheda agreed to pay Michael L. Durham, P.C. $450,000 in cash for the medical supplies which were stored in the warehouse. Given that two previous contracts for the sale of the medical supplies had fallen through, and given that Michael L. Durham, P.C. purchased the goods for $187,000 and took a $224,000 loss on the medical

supplies in 1993, the $450, 000 value placed by Michael L. Durham, P.C. on the property it lost is excessive. As the tax loss of $224,000 is the most objective value of the medical supplies, that value will be used to determine the losses of Michael L. Durham, P.C. Taking into account the $5,000 deductible under the Marine Indemnity policy, Michael L. Durham, P.C.'s damages are $219,000.

5. Vista Chemical

Of Vista Chemical's $1,512,634 loss, $309,837.60 was paid by Vista Chemical's own insurers. Taking into consideration the $309,837.60 which has been paid and the $5,000 deductible under the Marine Indemnity policy, Vista Chemical's damages are $1,197,796.40.

6. Third Coast Packaging

Third Coast Packaging had other insurance, but that insurance did not cover its losses, $66,750, from the Lockwood warehouse fire. Taking into consideration the $5,000 deductible under the Marine Indemnity policy, Third Coast's damages are $61,750.

7. The Fritz Companies/Snavley Forest Products

Of the $33,322.60 loss incurred by Snavley Forest Products, $29,000 was paid by Snavley's other insurance. The remaining loss of $4,322.60, when measured against the $5,000 deductible under the Marine Indemnity policy, leaves Snavley Forest Products with no compensable damages.

8. Oxid, Inc.

As Oxid's deductible under its other insurance is $100,000, Oxid's loss of $32,200 is not covered by other insurance. Thus, Oxid Inc.'s damages are $27,200, when the $5,000 deductible under the Marine Indemnity policy is taken into consideration.

9. R.D.A. Trading, Inc.

R.D.A. Trading had no insurance of its own to cover the $81,201.55 loss it incurred. Taking into consideration the $5,000

deductible under the Marine Indemnity policy, R.D.A. Trading's damages are $76,201.55.

10. Grand Lockwood Partners Limited Partnership

Grand Lockwood Limited Partnership, to the extent it did not have its own insurance which covered the costs of debris removal and clean-up, and taking into consideration the $5,000 deductible under the Marine Indemnity policy, has damages of $279,000.

IX. RECOMMENDED DISTRIBUTION OF INTERPLED FUNDS

Given the foregoing, the Master RECOMMENDS that the interpled funds, $1,275,610.00, plus interest at 6% to date of distribution, be distributed pro rata among the uninsured and covered claimants in the following proportions:

1. Kraft General Foods, Inc.: 33.72% of the interpled funds plus interest;[5]

2. IGI Baychem: 3.22% of the interpled funds plus interest;[6]

3. Michael L. Durham, P.C.: 7.42% of the interpled funds plus interest;[7]

5. Vista Chemical: 40.59% of the interpled funds plus interest;[8]

---

[5] Kraft's pro rata share of the interpled funds is calculated as follows: $995,000 (Kraft's covered claim) ÷ $2,950,947.95 (total covered claims) = 33.72%

[6] IGI Baychem's pro rata share of the interpled funds is calculated as follows: $95,000 (IGI Baychem's covered claim) ÷ $2,950,947.95 (total covered claims) = 3.22%

[7] Michael L. Durham, P.C.'s pro rata share of the interpled funds is calculated as follows: $219,000 (Michael L. Durham P.C.'s covered claim) ÷ $2,950,947.95 (total covered claims) = 7.42%

[8] Vista Chemical's pro rata share of the interpled funds is calculated as follows: $1,197,796.40 (Vista Chemical's covered claim) ÷ $2,950,947.95 (total covered claims) = 40.59%

6. Third Coast Packaging: 2.09% of the interpled funds plus interest;[9]

7. Oxid, Inc.: .92% of the interpled funds plus interest;[10]

8. R.D.A. Trading, Inc.: 2.58% of the interpled funds plus interest;[11]

9. Grand Lockwood Partners Limited Partnership: 9.46% of the interpled funds plus interest.[12]

---

[9] Third Coast Packaging's pro rata share of the interpled funds is calculated as follows: $61,750 (Third Coast Packaging's covered claim) ÷ $2,950,947.95 (total covered claims) = 2.09%

[10] Oxid, Inc.'s pro rata share of the interpled funds is calculated as follows: $27,200 (Oxid Inc.'s covered claim) ÷ $2,950,947.95 (total covered claims) = .92%

[11] R.D.A. Trading's pro rata share of the interpled funds is calculated as follows: $76,201.55 (R.D.A. Trading's covered claim) ÷ $2,950,947.95 (total covered claims) = 2.58%

[12] Grand Lockwood Partner Limited Partnership's pro rata share of the interpled funds is calculated as follows: $279,000 (Grand Lockwood Partners Limited Partnership's covered claims) ÷ $2,950,947.95 (total covered claims) = 9.46%

X. CONCLUSION

Within ten days after being served with this Report and Recommendation, any party may, pursuant to FED. R. CIV. P. 56(e)(2) file written objections to the Report and Recommendation. The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208 and a copy must be delivered to the Chambers of Judge Harmon, Room 9114, and to the Chambers of Magistrate Judge Stacy, Room 7727, Federal Building, 515 Rusk, Houston, Texas 77002.

Signed at Houston, Texas, this 29th day of December, 1995.

FRANCES H. STACY
UNITED STATES
MAGISTRATE JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARINE INDEMNITY INSURANCE,	§	
Plaintiff,	§	
	§	
V.	§	CIVIL ACTION
	§	NO. H-94-2430
LOCKWOOD WAREHOUSE & STORAGE, THIRD COAST PACKAGING, SNAVELY FOREST PRODUCTS, INC., MICHAEL DURHAM, IGI BAYCHEM, INC., INTEGRATED LABS, ATLANTIS INTERNATIONAL COMMODITIES, INC., OXID, INC., R.D.A. INTERNATIONAL, INC., VISTA CHEMICAL,, PHOENICIAN ENTERPRISES, INC., MAXWELL HOUSE COFFEE COMPANY, SHIPPERS INTERNATIONAL, INC., CXI, INC., ULTRA WAREHOUSE, INC., CITATION CORPORATION, FRITZ COMPANIES, INC., GRAND LOCKWOOD PARTNERS LIMITED PARTNERSHIP, and INTEGRATED FURNITURE & EQUIPMENT,	§	
Defendants.	§	

ERRATA SHEET SUPPLEMENTING THE SPECIAL MASTER'S REPORT AND RECOMMENDATION

After considering the objections filed by the parties, and recognizing certain typographical errors, the Magistrate Judge submits the following errata sheet supplementing the Special Master's Report and Recommendation.

1. Finding of Fact 50 on page 17 should read:

> Packaged plastic materials, with a cost of $547,546.63, which were being stored in the Lockwood warehouse by H. Muelstein & Co., Inc., were destroyed in the Lockwood warehouse fire. Affidavit of Martin Zielonka. The net sales value of the lost packaged plastic materials was $1,078,233. Affidavit of Gary Markelon, attached to H. Muelstein & Company's Brief on the Issue of Priority of Claims.

2. Conclusion of Law on Damages 10 on page 50 should read:

> Grand Lockwood Limited Partnership, to the extent it did not have its own insurance which covered the costs of debris removal and clean-up, and taking into consideration the $5,000 deductible under the Marine Indemnity policy, has damages of $379,000.

3. Given the error with respect to the damages of Grand Lockwood Limited Partnership, a recalculation of the recommended distribution of the interpled funds is required resulting in the following change to IX, pages 50-51:

> Given the foregoing, the Master RECOMMENDS that the interpled funds, $1,275,610.00, plus interest at 6% to date, be distributed among the uninsured and covered claimants in the following proportions:
>
> 1. Kraft General Foods, Inc.: 32.61% of the interpled funds plus interest to date;[1]
>
> 2. IGI Baychem: 3.11% of the interpled funds plus interest to date;[2]

---

[1] Kraft's pro rata share of the interpled funds is calculated as follows: $995,000 (Kraft's covered claim) ÷ $3,050,947.95 (total covered claims) = 32.61%

[2] IGI Baychem's pro rata share of the interpled funds is calculated as follows: $95,000 (IGI Baychem's covered claim) ÷ $3,050,947.95 (total covered claims) = 3.11%

3. Michael L. Durham, P.C.: 7.18% of the interpled funds plus interest to date;[3]

4. Vista Chemical: 39.26% of the interpled funds plus interest to date.[4]

5. Third Coast Packaging: 2.03% of the interpled funds plus interest to date;[5]

6. Oxid, Inc.: .89% of the interpled funds plus interest to date;[6]

7. R.D.A. Trading, Inc.: 2.50% of the interpled funds plus interest to date;[7]

8. Grand Lockwood Partners Limited Partnership: 12.42% of the interpled funds plus interest to date.[8]

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[3] Michael L. Durham, P.C.'s pro rata share of the interpled funds is calculated as follows: $219,000 (Michael L. Durham P.C.'s covered claim) ÷ $3,050,947.95 (total covered claims) = 7.18%

[4] Vista Chemical's pro rata share of the interpled funds is calculated as follows: $1,197,796.40 (Vista Chemical's covered claim) ÷ $3,050,947.95 (total covered claims) = 39.26%

[5] Third Coast Packaging's pro rata share of the interpled funds is calculated as follows: $61,750 (Third Coast Packaging's covered claim) ÷ $3,050,947.95 (total covered claims) = 2.03%

[6] Oxid, Inc.'s pro rata share of the interpled funds is calculated as follows: $27,200 (Oxid Inc.'s covered claim) ÷ $3,050,947.95 (total covered claims) = .89%

[7] R.D.A. Trading's pro rata share of the interpled funds is calculated as follows: $76,201.55 (R.D.A. Trading's covered claim) ÷ $3,050,947.95 (total covered claims) = 2.50%

[8] Grand Lockwood Partners Limited Partnership's pro rata share of the interpled funds is calculated as follows: $379,000 (Grand Lockwood Partners Limited Partnership's covered claim) ÷ $3,050,947.95 (total covered claims) = 12.42%

These corrections shall be incorporated into the Special Master's Report and Recommendation.

Signed at Houston, Texas, this 6th day of February, 1996.

FRANCES H. STACY
UNITED STATES
MAGISTRATE JUDGE

Supreme Court, U.S.
FILED
OCT 10 1997
CLERK

No. 97-421

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

GRAND LOCKWOOD PARTNERS
LIMITED PARTNERSHIP,

Petitioner,

v.

MAXWELL HOUSE COFFEE COMPANY,
KRAFT GENERAL FOODS, INC.,
VISTA CHEMICAL COMPANY, ENTERPLAST, INC.,
and H. MUEHLSTEIN & CO., INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS MAXWELL HOUSE COFFEE COMPANY, KRAFT GENERAL FOODS, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Washington, D.C. • THIEL PRESS • (202) 328-3296

42 pp

QUESTION PRESENTED

1. May a party who fails to file a notice of appeal benefit from a reversal upon remand of the case?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit include:

1. Petitioner, Grand Lockwood Partners Limited Partnership;
2. Maxwell House Coffee Company, Respondent;
3. Kraft General Foods, Inc., Respondent; Kraft is a wholly owned subsidiary of Philip Morris, Inc. which is not a party to this case.
4. Vista Chemical Company, Respondent;
5. Enterplast, Inc., Respondent; and
6. H. Muehlstein & Co., Inc., Respondent.

Other than as noted, none of the parties has a parent company or nonwholly owned subsidiary involved in this matter.

TO THE HONORABLE SUPREME COURT:

The Respondents Maxwell House Coffee Company, Kraft General Foods, Inc. respectfully request that this court deny the Petition for Writ of Certiorari submitted by the Petitioner.

COUNTERSTATEMENT OF THE CASE

*At the outset of this brief Respondent represents to the Court that the response contained herein does not address the issues and arguments presented by Petitioner for the reason that Respondent does not believe that the question raised presents an issue properly before this Court. The response contained herein is intended to point out why the issue is not proper for this Court to consider and a grant of certiorari would be inappropriate in this case irrespective of the law in the various Courts of Appeals on the question suggested by Petitioner.

Respondents agree that this case arises from an interpleader action filed pursuant to 28 U.S.C. §1335, but would show the Court that the sole question presented, i.e., whether parties who fail to meet the jurisdictional notice of appeal requirement can benefit from a reversal has no bearing on the issues presented to the Court of Appeals. This matter is not ripe for decision by this court, and to the extent that the Petition for Certiorari seeks such an opinion at this time it is seeking an advisory opinion.

The statement of the case filed by Petitioners misstates the role of the insurer, Marine Indemnity Co.,

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*Both Petitioner and Respondent filed appendices with their briefs. References to Petitioner's Appendix cited herein will be identified as (App. ___). References to Respondent's Appendix will be identified as (R. App. ___).

(Marine) in that Marine, which tendered its available policy proceeds into the registry of the court in connection with the action in interpleader, did not insure the warehouse itself, but rather insured only certain contents within the warehouse owned by certain parties, as well as cleanup and debris removal expenses incurred by the named insured, Lockwood Storage and Warehouse.

In its decision as to how the interpled funds would be distributed among the various claimants, the district court determined the fact that the amount of interpled funds was inadequate to cover the claims against the policy proceeds, which the court found to be valid, and therefore the district court made a determination of priority of coverage. (App. 71a) That determination of priority and subsequent finding resulted in an award of 12.42% of the interpled funds to Petitioner for debris removal and clean up expense, which was challenged on appeal. The sole issue raised on the appeal in the Fifth Circuit by Respondents Maxwell House/Kraft was a challenge to the total award by the district court of any of the interpled funds to Petitioner. (R. App. 19a)

In its opinion reversing the district court, the Court of Appeals concluded that Petitioner had failed to meet its burden of proof in establishing that it was an intended beneficiary under the debris removal and cleanup portions of the Marine policy and for that reason the judgment of the district court awarding funds to Petitioner was reversed. (App. 15a) That finding by the Court of Appeals has not been challenged by Petitioner in this proceeding. The effect of that reversal was to require a return of the policy proceeds to the district court by Petitioner subject to further proceedings in the district court.

The Petition for Writ of Certiorari states that Respondent Maxwell House/Kraft filed its Notice of Appeal in the Court of Appeals complaining of the award to Petitioner and seeking for Respondent Maxwell House/Kraft a higher award. Although it is a necessary corollary to a reversal of the award to Petitioner that there would be more funds to distribute among claimants, the focus of the Appeal and the issues addressed in the Appellant's brief submitted by Respondent Maxwell House/Kraft was the award of *any* interpled funds to Petitioner. (R. App. 19a)

ARGUMENT IN OPPOSITION TO CERTIORARI

I. THE ISSUE RAISED BY THE PETITIONER IS NOT JUSTICIABLE.

"[T]he oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, FEDERAL COURTS 34 (1963). "[N]o justiciable controversy is presented. . . when the parties are asking for an advisory opinion. . . ." *Id.* at 95. The Fifth Circuit remanded this action to the district court for the district court to redistribute the funds improperly paid to the Petitioner. The district court has at this time made no additional award to the nonappealing parties. Until such time as the district court awards any funds to nonappealing parties, Petitioner has no basis to complain, assuming, arguendo, that it would have standing to complain. Furthermore, if the district court errs in its allocation of the funds, any appeal would be to the Fifth Circuit, not to this Court. The Petitioner seeks an advisory opinion to guide the district court in its allocation of the interpled funds. This is not a proper basis for granting certiorari.

II. PETITIONER HAS NO STANDING TO APPEAL THE QUESTION PRESENTED.

The appeal to the Fifth Circuit by Respondent Maxwell House/Kraft challenged the district court's award of any funds to Petitioner based on Petitioner's failure to prove a right to recover under the Marine policy. (R. App. 19a) A challenge to the totality of that award did not require an appeal by all parties.[1] The finding of the Court of Appeals sustained Respondent Maxwell House/Kraft's challenge to the award of any funds to Petitioner. (App. 15a) Any issue concerning reallocation of the funds returned to the district court by Petitioner among the parties to the interpleader was secondary to the challenge of the award of any funds to Petitioner and not an issue that the Court of Appeals needed to address in resolving the appellate issues presented to the court by Respondent Maxwell House/Kraft's appeal. The Court of Appeals' opinion concluded that Petitioner was not entitled to any policy proceeds. That finding is final and has not been challenged in the Petition for Writ of Certiorari. Having waived its right to appeal the Fifth Circuit finding on the merits that it was not entitled to any proceeds of the interpleader, Petitioner has no stand-

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[1] The Special Master's Report and Recommendation (App. E) and the Errata Sheet Supplementing the Special Master's Report and Recommendation (App. G) in the district court, which was adopted as the opinion of the district court (App. 31a) found that Kraft's uninsured damages were $995,000 after applying the Marina Indemnity deductible. (App. 76a) The trial court awarded Kraft 33.72% of the $1,275,610.00 which had been interpled, or $430,135.70 plus interest (App. 20a, 82a). Thus, if the district court allocated all of the funds to Kraft that had previously been awarded to Petitioner, $158,430.76 plus interest (App. 21a, 83a), Kraft would still have sustained an uninsured loss of $411,433.54. Thus, the question of who appealed and who did not is immaterial as it relates to possible action by the district court following remand.

ing to seek by way of a Petition for Writ of Certiorari a ruling from this Court that would direct the district court as to how it should decide an essentially equitable proceeding. (App. 50a) *See Flast,* 392 U.S. at 95.

III. PETITIONER IS ATTEMPTING AN IMPROPER COLLATERAL ATTACK ON THE FIFTH CIRCUIT'S RULING.

The Petitioner seeks to circumvent the effect of the Fifth Circuit ruling on a point which it did not and could not otherwise appeal to this Court. Under the guise of a question regarding the rights of nonappealing parties, the Petitioner is implicitly attacking the Fifth Circuit ruling that it has no right to retain the funds awarded to it by the trial court, a point which it has not otherwise appealed to this Court. That type of review is not within the purview of a Petition for Writ of Certiorari and since Petitioner has no standing to complain about how the funds are reallocated by the district court, Petitioner also has no standing to seek a review in this Court or to present issues concerning the status of appealing versus nonappealing parties when there has been no decision relating to that issue by any lower court for consideration on appeal.

CONCLUSION

Certiorari is not warranted. For the reasons set forth above, Respondents Maxwell House/Kraft respectfully request that this court deny the Petition for Writ of Certiorari.

Respectfully submitted,

SLOAN B. BLAIR
JOHN C. HART
BRUCE H. ROGERS
Attorneys for Respondents.

RESPONDENT'S APPENDIX

**[Brief of Appellants in
U.S. Court of Appeals for the Fifth Circuit]**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20441

MARINE INDEMNITY INSURANCE
COMPANY OF AMERICA

Plaintiff

v.

LOCKWOOD WAREHOUSE & STORAGE, ET AL

Defendants

MAXWELL HOUSE COFFEE COMPANY;
KRAFT GENERAL FOODS INC.

Defendants - Appellants

v.

KRAFT GENERAL FOODS INC; GRAND LOCKWOOD
PARTNERS LIMITED PARTNERSHIP; THIRD COAST
PACKAGING; IGI BAYCHEM, INC, OXID, INC;
R D A INTERNATIONAL, INC; PHILIP WERNER;
VISTA CHEMICAL

Defendants - Appellees

v.

ENTERPLAST, INC; H MUEHLSTEIN & CO

Intervenor Defendants - Appellants

Appeal From Final Judgment Entered By
The U.S. District Court for the
Southern District of Texas Civil No. 94-CV-2430

BRIEF OF APPELLANTS MAXWELL HOUSE COFFEE COMPANY AND KRAFT GENERAL FOODS, INC. FOR THE ACCOUNT OF THEIR DEDUCTIBLE UNINSURED INTEREST

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MAXWELL HOUSE COFFEE
COMPANY AND KRAFT
GENERAL FOODS, INC.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20441

MARINE INDEMNITY INSURANCE
COMPANY OF AMERICA

Plaintiff

v.

LOCKWOOD WAREHOUSE & STORAGE, ET AL

Defendants

MAXWELL HOUSE COFFEE COMPANY;
KRAFT GENERAL FOODS INC.

Defendants - Appellants

v.

KRAFT GENERAL FOODS INC; GRAND LOCKWOOD
PARTNERS LIMITED PARTNERSHIP; THIRD COAST
PACKAGING; IGI BAYCHEM, INC, OXID, INC;
R D A INTERNATIONAL, INC; PHILIP WERNER;
VISTA CHEMICAL

Defendants - Appellees

v.

ENTERPLAST, INC; H MUEHLSTEIN & CO

Intervenor Defendants - Appellants

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellants Maxwell House Coffee Company and Kraft General Foods, Inc. for the account of their deductible uninsured interests certifies that the following listed persons and other entities are financially interested in the outcome of this litigation. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

A. Named Parties:

1. Atlantic International Commodities, Inc.
2. Citation Sales & Marketing, Inc.
3. William Lance Cowan d/b/a Shippers International
4. Custom Form Transportation Systems, Inc.
5. CXI, Inc.
6. Michael L. Durham, P.C.
7. Michael L. Durham
8. Enterplast, Inc.
9. The Fritz Companies, Inc.
10. Grand Lockwood Partners Limited Partnership
11. IGI Baychem, Inc.
12. Integrated Laboratory, Furniture & Equipment
13. Kraft General Foods, Inc.
14. Lockwood Corporation
15. Maxwell House Coffee Company Division of Kraft General Foods, Inc.
16. H. Muehlstein & Co., Inc.
17. Oxid, Inc.
18. Philip Morris Companies Inc.
19. Phoenician Enterprises, Inc.
20. R.D.A. Trading, Inc.
21. Simpson Paper Co.

22. Simpson Pasadena Paper Co.
23. Snavely Forest Products, Inc.
24. Third Coast Packaging, Inc.
25. Ultra Warehouse, Inc.
26. Vista Chemical Company

B. Counsel for the Interested Parties:
1. Richard E. Anderson.
2. Mark W. Stevens.
3. Larry J. Goldman and Jason R. Cliffe of the law firm of Davis, Adami & Cedillo, Inc.
4. Paul J. Coselli and Allan R. Lazor of the law firm of Coselli and Lazor.
5. Steven P. Vangel and Robert G. Moll of the law firm of Hill, Rivkins, Loesberg, O'Brien, Mulroy & Hayden.
6. Robert C. Oliver of the law firm of Sharpe & Kajander.
7. Robert L. Ketchand of the law firm of Short & Ketchand, L.L.P.
8. Hal R. Gordon and Paul M. Gordon of the law firm of Gordon & Gordon.
9. Philip Werner and Mary Thompson of the law firm of Hohmann, Werner & Taube, L.L.P.
10. John C. Hart, John C. Stewart, Sandra C. Liser, and Sloan Blair of the law firm of Cantey & Hanger, L.L.P.
11, David F. Chappell of the law firm of Chappell & McGartland, L.L.P.
12. Dale R. Mellencamp of the law firm of Gilpin, Paxson & Bersch, L.L.P.
13. Robert L. Levy, Timothy McInturf and Michael T. Powell of the law firm of Haynes & Boone, L.L.P.
14. Mark J. Airola

15. William H. Seele and James M. Davin of the law firm of Julian & Seele, P.C.
16. Michael R. Tibbets and Stephen C. Reid, III, of the law firm of DeLange, Hudspeth and Pitman, L.L.P.
17. James R. Koecher, of the law firm of Brown, Sims, Wise & White, P.C.

C. Insurance Interests of the Various Parties Known to the Undersigned:

Aetna Insurance Company
American Home Assurance Company
Arkwright Mutual Insurance Company
Fidelity & Casualty Company of New York
Home Indemnity Company
Intercargo Insurance Company
William H. McGee & Co., Inc.
Northbrook Property and Casualty Company
Phoenix Assurance Company of New York
Reliance Insurance Company of Illinois
Lexington Insurance Company
Certain Underwriters at Lloyds, London

/s/ John C. Hart
John C. Hart
Attorney of Record for
Defendants/Appellants

STATEMENT REGARDING ORAL ARGUMENT

The appeal by these appellants challenges the district court's interpretation of the scope of coverage provided under an insurance contract as it relates solely to the claim of Grand Lockwood Partners Limited Partnership for clean up and debris removal expenses. We believe that the errors asserted and the relief sought can be readily discerned from this brief and the record, and that oral argument would not be of additional benefit to the Court. However, if the Court grants oral argument in response to a request by any other party to this portion of the appeal, Appellants Maxwell House Coffee Company and Kraft General Foods, Inc. would request an opportunity to present oral argument on this issue.

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STATEMENT OF APPELLATE JURISDICTION

The United States Court of Appeals for the Fifth Circuit has jurisdiction over this appeal under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

Lockwood Warehouse and Storage ("Lockwood") was the sole tenant and operator of a warehouse operation in a building (the "Building") it leased from the Building owner, Grand Lockwood Partners Limited Partnership (the "Partnership"). Lockwood purchased an Inland Transit Floater property insurance policy (the "Policy") from Marine Indemnity Insurance Company of America ("Marine Indemnity"). The Policy provided insurance for certain property stored by Lockwood or its warehouse "tenants" within the Building. On November 8, 1993, a fire occurred which destroyed the building and all of its contents. Claims were made against Lockwood and Marine Indemnity by various entities who had personal property stored in the building for the value of damaged property far in excess of the policy limits.

This case involves an interpleader action filed in the district court by Marine Indemnity in which Marine Indemnity tendered its policy limits, which Marine Indemnity agreed were payable, into the registry of the court so the court could resolve the conflicting claims of various companies who claimed damage to their property from the fire, companies whose personal property destroyed in the fire far exceeded the limits of the Policy. In contrast to the claims of various entities generally referred to as the "tenants" for damage to their personal property, some of which was insured under the Policy, the Partnership, the owner of the Building, sought to recover expenses for clean up and removal of all the

debris from the Building after the fire. Of the policy proceeds tendered with the court in the amount of $1,275,610.00, the final judgment allocated 87.58%, of the tendered amount, or $1,117,179.24 plus accrued interest, to the "tenants" for damages to personal property in the amount of $2,671,947.95, the amount the trial court found represented uninsured losses for damaged personal property insured under the Policy. $158,-430.76 plus accrued interest was awarded to the Partnership, for either clean up or debris removal expenses. Appellants Maxwell House and Kraft, on behalf of their $1,000,000 deductible uninsured loss, objected to the trial court's award of any amount to the Partnership and appeal the award by the trial court of any of the interpled funds to the Partnership.

The issues presented in this appeal are whether the Partnership was entitled to any award under the Policy for clean up or debris removal expenses that it incurred because:

I. The Policy only extended coverage for clean up and debris removal expenses, if at all, for those expenses incurred by the Insured, Lockwood.

II. No recovery should have been allowed for clean up and debris removal expenses until all claims for damaged property were satisfied;

III. No evidence was offered that the named insured, Lockwood, satisfied the condition precedent to recovery for debris removal or clean up costs, which required the Insured, Lockwood, to give notice to the underwriters of Lockwood's intent to claim for such cost no later than 12 months after the date of loss; and

IV. The Partnership failed to offer evidence that the debris removal expense it incurred was specifically related to the removal of property insured under the Policy for which recovery was allowed as opposed to the removal of debris of personal property which the district court found to be property not insured under the policy.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below.

This appeal arises from the final judgment in an interpleader action filed by Marine Indemnity. Marine Indemnity issued an Inland Transit Floater property insurance policy to Lockwood which insured personal property of Lockwood and personal property of others directly connected to Lockwood's business; in Lockwood's care, custody or control; and for which Lockwood was responsible, or which Lockwood had agreed in writing to insure prior to loss. The Policy is included in the Record Excerpts at Tab 10.[1] By its manuscript terms, the Policy specifically stated that it did not provide coverage to Real Property of the Insured. (Rec. Ex. Tab. 10 p. 21). On November 8, 1993, fire destroyed the Building and all of the personal property contained therein. (Rec. Ex. Tab 2 p. 2091). This resulted in multiple, conflicting claims under the Policy for amounts far in excess of the coverage limits of the Policy. (*Id.*) The uninsured losses for damage to personal property of businesses which had stored goods with Lockwood was $2,671,947.95. (Rec.

[1] The pages of the Policy which Kraft believes are most relevant to the issues in this appeal are attached hereto as an Appendix to this Brief.

Ex. Tab 2 pp. 2043-2045). In addition, damage to other personal property in the building which in some instances was covered by other insurance companies was $14,900,-705.55. (Rec. Ex. Tab 2 pp. 2086-2075). Over and above the claims for damage to personal property was a single claim of the Partnership, the Building owner, for debris removal expenses.[2] (Rec. Ex. Tab 2 p. 2074).

In the district court's final judgment, Kraft General Foods, Inc., on behalf of itself and its Maxwell House Coffee Company Division (collectively "Kraft") was awarded a portion of the interpled fund for its uninsured deductible interest, (Rec. Ex. Tab 5 p. 2215), but far less than the total uninsured loss sustained by Kraft. (Rec. Ex. Tab 2 p. 2045). Kraft received approximately 41.6% of its uninsured loss plus accrued interest on that amount, based on the trial court's allocation of policy proceeds. The district court also awarded 12.42%, or $158,430.76 plus interest, of the interpled funds to the Partnership for the Partnership's claim for expenses incurred by the Partnership in removing debris of damaged personal property from the Building site after the fire. (Rec. Ex. Tab 5 p. 2214). Unlike all other claimants under the Policy, the Partnership had no property stored within the Building, did not claim through the Insured (Lockwood), and the amount of the value of its claim did not originate from stated or reported values. (*See generally* Rec.). Rather, the Partnership was the owner of the Building and Lockwood's landlord. (Rec. Ex. Tab 2 p.

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[2]The trial court and brief's of counsel for the Partnership refer to the claim as one for "clean up costs and debris removal expenses." In fact, as will be shown hereinafter, there was no evidence offered for clean up costs and the only expenses proven up were for debris removal. For that reason, Appellants refers only to debris removal in this brief.

2091). The Partnership brought its claim when Lockwood allegedly failed or refused to clean up the Building site and remove the debris from the fire after Lockwood terminated its lease with the Partnership following the fire. (Rec. Ex. Tab 11 p. 1506).

The district court appointed Magistrate Frances Stacy to act as a master to consider the issues of insurable interest, calculation of damages, and priority of claims. (Rec. Vol. 7, p. 602). The claimants presented the master with oral and/or written testimony evidencing both the nature and scope of their claims and briefed their positions on the issues submitted to the master. (*See generally* Rec.). On January 2, 1996, the master issued her report and recommendation, wherein, among other things, she found that the Partnership was entitled to a share of the interpled fund which she stated, at that time, to be based upon the Debris Removal Clause contained on page 6 of the Policy. (Rec. Ex. Tab 2 p. 2051). That finding diminished the pool of insurance funds available to cover damaged insured personal property by the amount of the award to the Partnership.

Kraft objected to the master's finding with respect to the award to the Partnership, asserting that: (1) the Debris Removal Clause of the Policy did not cover the Partnership's expenses because the Partnership was not an insured under the Policy (Rec. Vol. 2, p. 2137); (2) the Debris Removal Clause of the Policy did not cover the Partnership's expenses because the expenses were not incurred by Lockwood, the Insured; (Rec. Vol. 2, p. 2147); (3) the Partnership's claim was based on Lockwood's refusal to comply with the provisions of the lease agreement between the Partnership and Lockwood after the lease had been terminated and thus was a claim for breach of contract and not covered by the Policy (Rec.

Vol. 2, p. 2146); (4) the Partnership's proof was defective because it claimed the entire cost for removal of debris of all damaged personal property whether insured under the policy or not, and its costs were not limited to nor segregated between the cost of removal for debris of personal property insured and personal property which was not insured (*Id.*); and (5) Lockwood had already released any claims against the Policy for debris removal expenses (Rec. Vol. 2, p. 2137).

On March 4, 1996, the District Court entered a Memorandum Opinion and Order and its Final judgment. (Rec. Ex. Tab 4 pp. 2205-13). In its Memorandum Opinion and Order, the district court adopted the Master's findings of fact and also ruled for the first time that the Pollution Endorsement to the Policy was the basis for its finding of coverage for the Partnership's claim for debris removal expenses without reversing the finding of the Master concerning the Debris Removal Clause in the main body of the Policy. (Rec. Ex. Tab 4 p. 2208). It is from this award to a party whom Kraft regards as a stranger to the policy that Kraft appeals.

B. Statement of Facts.

The Partnership owned the Building and leased it to Lockwood under a written lease agreement. (Rec. Ex. Tab 2 p. 2086). Lockwood operated a warehouse on the leased premises, (*Id.*), and purchased insurance for certain classes of personal property under the Policy issued by Marine Indemnity (Rec. Ex. Tab 10 pp. 6-25). The Policy provided coverage for, among other things, "Personal Property of others [i.e. not the named insured] which [was] directly connected with the Insured's business while in the care, custody or control of the Insured and for which the Insured [was] responsible, or for which the Insured [had] agreed in writing prior to loss to

insure."(Appendix 1 p. 2; Rec. Ex. Tab 10 p. 24). The Building and the personal property of Lockwood and of the businesses which had entrusted their property to Lockwood, or which Lockwood agreed to insure, were destroyed by fire. (Rec. Ex. Tab 2 p. 2021). The Policy limits of coverage were insufficient to cover the value of all of the personal property insured under the policy. (*Id.*) The total value of the personal property destroyed in the Building by the fire was $17,572,653. (Rec. Ex. Tab 2 pp. 2074-86). The trial court found that coverage existed under the Policy for goods destroyed and expenses incurred in the amount of $3,050,947.95, (Rec. Ex. Tab 3 pp. 2095-97), or just over 17% of the total value of personal property destroyed in the fire. This amount includes $379,000.00 for debris removal expenses incurred by the Partnership. (Rec. Ex. Tab 3 p. 2196). Thus, of the $17,572,653 of personal property destroyed in the fire, only $2,671,947.95 was found by the Magistrate to be a compensable loss under the Policy.

The district court held that the property of a number of claimants was not insured under the Policy. As to the claimants who received an award under the policy, only a portion of their damaged personal property (that portion not otherwise insured) was included in calculating the percentage of award from the policy proceeds. (Rec. Ex. Tab 2 pp. 2049-51). In contrast, the Partnership's claim against the Policy was for the entire cost of removal of the debris of the property stored in the warehouse incurred by the Partnership. (Rec. Ex. Tab 11 pp. 1505-06). The Partnership claimed that it requested that Lockwood remove the debris of the fire from the Building site, but Lockwood refused. (Rec. Ex. Tab 11 p. 1506). The Partnership asserted that it subsequently did so at its own expense. (*Id.*) The evidence presented by the Partnership

in support of its claim lists $384,000.00 as the cost of debris removal for all personal property at the Building, and does not segregate the cost of removing debris of property insured under the Policy. (Rec. Ex. Tab 11, p. 1505).

The Affidavit of Martin Leibowitz, submitted on behalf of the Partnership, stated that the claim for $384,-000 submitted by the Partnership was for debris removal, with no reference to clean up cost. (*Id.*) His affidavit and that of John Cherry, the contractor who performed the debris removal, state that the $384,000 expense was for "the removal of the debris of the items stored in the warehouse." (Rec. Vol. 4 p. 1388). The total value of all the items destroyed in the warehouse was more than six and a half times the value of the property as to which the trial court determined was covered under the Policy.[3] However, the trial court based the award to the Partnership on 100% of the Partnership's claim for debris removal expense.

The subject of debris removal is addressed in two areas of the Policy: (1) in the Debris Removal Clause (Policy Clause 13, Appendix 1 p. 5; Rec. Ex. Tab 10 p. 19); and (2) in the Debris Removal and Cost of Clean Up Extension which was a part of the Pollution Endorsement to the Policy. (Appendix 1, p. 8; Rec. Ex. Tab 10 p. 10).

Among other things, the Debris Removal and Cost of Clean Up Extension in the Pollution Exclusion provides that:

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[3]The actual recovery allowed was only for a percentage of the claim in the raio that $3,050,947.95 (the total amount allowed by the Court) bears to $1,275,610 (the amount of funds tendered into the registry of the court).

1) It is subject to the other terms of the policy. "[T]his Policy (subject otherwise to its terms, conditions, and limitations, including but not limited to any applicable deductible) also insures, within the sum insured . . .". (Appendix 1 p. 8; Rec. Ex. Tab 10 p. 10).

2) There are two conditions precedent to recovery under this extension:

   a) "[the] Underwriters shall have paid or agreed to pay for direct physical loss or damage to the property insured hereunder unless such payment is precluded solely by the operation of any deductible; and

   b) that the Assured shall give notice to the Underwriters of intent to claim for cost removal of debris or cost of cleanup NO LATER THAN 12 MONTHS AFTER THE DATE OF SUCH PHYSICAL LOSS OR DAMAGE." (Appendix 1 p. 8; Rec. Ex. Tab 10 p. 10) (emphasis in original).

In its Complaint for Interpleader, Marine Indemnity acknowledged its obligation for direct damage to insured property and asked the Court for direction as to whom payment should be made and how much to each party. (Rec. Vol. 9 p. 27). Unlike all other claimants, the Partnership is not seeking the value of insured personal property destroyed in the fire. (*See generally* R.)

STATEMENT OF THE STANDARD OF REVIEW

The standard of review on Kraft's appeal is *de novo* on all issues presented. Kraft appeals from the magistrate's and the district court's conclusions of law concerning the coverage available to the Partnership under the Policy and whether the Partnership has carried its burden of proof in

the interpleader action. On appeal, a magistrate's conclusions of law, when adopted by the district court, as here, are considered as conclusions of the district court. *Lockette v. Greyhound Lines, Inc.*, 817 F.2d 1182, 1185 (5th Cir. 1987). A district court's conclusions of law are subject to de novo review on appeal. (*Id.*)

SUMMARY OF ARGUMENT

This appeal is predicated on the premise that the Partnership, as the owner of the Building, is an interloper which has no standing to make a claim against the interpled policy proceeds for the expenses it submitted in this claim.

The Partnership was not an intended beneficiary of the policy proceeds based upon a clear and simple reading of the policy language. Real property was not insured. The Partnership did not have any personal property for which it made a claim. The Debris Removal Clause only covered expenses incurred by the Insured. The Debris Removal Extension similarly covered only the Assured for clean up and debris removal expenses, subject to compliance with the conditions precedent in the policy and the policy limits.

Additionally, because the damage to personal property covered by the policy exceeds the policy limits, the clean up or debris removal expenses would not be compensable under the Policy because the Policy would only cover those expenses if there were an amount of coverage available after payment for damage to insured personal property. This conclusion is based upon the fact that the Debris Removal Clause states that it is specifically not intended to enlarge the policy limits. Further, there is a condition precedent to recovery for clean up

or debris removal under the Debris Removal Extension in the Pollution Endorsement requiring that the underwriters shall have paid or agreed to pay for direct physical loss or damage to the property insured under the policy. Logic would dictate that if the debris removal and clean up provision does not enlarge policy limits; if a condition precedent to debris removal recovery is payment or an agreement to pay for damage to insured property; and if the damage to insured property exceeds the policy limits; then debris removal and clean up expenses are not recoverable.

Furthermore, the Partnership's claim for debris removal expenses should fail because there is no evidence that Lockwood notified Marine Indemnity that it intended to make a claim for clean up and debris removal expenses under the Pollution Endorsement at any time, much less within 12 months after the fire. There is a complete failure of proof to demonstrate that this condition precedent of the policy was met. Thus, the Partnership's status is that of a stranger to the policy and its claim should have been disallowed.

Finally, even if the Court were to find that the Partnership is legitimately entitled to assert a claim, the Partnership should still not be entitled to recover the full amount awarded by the trial court because the evidence offered by the Partnership did not include any proof of "clean up" expenses and the only evidence of expense for debris removal submitted by the Partnership to the court was for removal of all debris in the building, including property not insured under the Policy, and for which the Policy would therefore not pay to remove. The Partnership failed to segregate debris removal for insured versus uninsured property. The trial court's award was errone-

ous as a matter of law and in the absence of specific proof within the policy cover, the Partnership's claim should be disallowed.

ARGUMENT

A. Only Clean Up and Debris Removal Expenses Incurred by the Insured (Lockwood) are Covered by the Policy.

The Policy contains two sections which address the subject of debris removal. The first, located in the main body of the policy, states, in part, "This policy is extended . . . to cover **the Insured's expenses** incurred in the removal of all debris of the property insured . . . ." (Appendix 1 p. 5; Rec. Ex. Tab 10 p. 19, emphasis added). The named Insured in the Policy was Lockwood. (Appendix 1 p. 1; Rec. Ex. Tab 10 p. 25). There are no "other insureds" or "additional insureds" in the policy nor any provision for such to be added. (*See generally* Rec. Ex. Tab 10 pp. 6-25). Since the Partnership is not the Insured, the expenses claimed by the Partnership are not covered by the above quoted language from the Policy.

The second provision relating to debris removal is found in the Pollution Endorsement. (Appendix 1 pp. 7-9; Rec. Ex. Tab 10 pp. 9-11). This provision states that the Policy also insures "expenses reasonably incurred in removal of debris of the property insured . . . and/or [the] cost of clean up, at the premises of the Assured." (Appendix 1 p. 8; Rec. Ex. Tab 10 p. 10). The debris removal provision in the Pollution Endorsement also contains two conditions precedent, one of which requires "that the Assured shall give notice to the Underwriters of intent to claim for cost removal of debris or cost of clean up . . . ." (*Id.*) While Kraft believes that the condi-

tions precedent have many other implications that relate to this Appeal, (*see infra*) the language which requires the Assured to give notice of intent to claim cost of removal is consistent with the intent expressed in the Debris Removal Clause in the main body of the policy that only expenses incurred by the Insured for debris removal are covered. It is a well established principle of insurance law that if possible the terms of the policy should be interpreted so as to give full effect to all the terms. *Cicciarella v. Amica Mut. Ins. Co.*, 66 F.3d 764, 768 (5th Cir. 1995).

The interpretation of the Policy argued by the Partnership which was accepted by the trial court changed the identity of who is an Insured entitled to assert a claim under the policy. Based on the trial court's ruling, anyone spending money for debris removal would be entitled to make a claim against the proceeds of the Policy. For example, if the Partnership had sold the building to a buyer "as is" with structural wreckage and debris of damaged personal property still on the premises, based on the trial court's ruling, that entity would be entitled to make a claim under the Policy for debris removal expense. Similarly, if a salvor had taken over damaged insured personal property in place, the trial court's ruling would entitle the salvor to assert a claim for debris removal expenses. The result in either of these examples would be ludicrous and would totally disregard the provisions in the Policy which identify the Insured and the Property Insured.

The trial court did not address who was an Insured in its opinion and Kraft believes that the condition precedent which refers to notice of intent by the Assured to make claim was not considered by the trial court. The coverage language in the Pollution Endorsement, when read in conjunction with the condition precedent in such

Endorsement and the Debris Removal Clause in the main body of the Policy, demonstrates that the Policy insured only expenses directly incurred by the Insured.

Under Texas law, "[i]t is the duty of the Court to construe the contract as an entire instrument, and to consider each part with every other part so that the effect and meaning of one part on any other part may be determined." *Smart v. Tower Land & Inv. Co.*, 597 S.W.2d 333, 337 (Tex. 1980). The portion of the policy first discussed above expressly states that only the expenses of the Insured are covered. The Pollution Endorsement, in requiring that the Assured notify the Underwriters that the Assured intended to claim against the policy for clean up expenses, implicitly makes the same requirement. Further, the endorsement excludes expenses incurred or ordered by any Government Agency, Court or other Authority. (Appendix 1 p. 9; Rec. Ex. Tab 10 p. 9). The Pollution Endorsement, in so limiting the coverage provided, is completely consistent with the requirement that expenses be incurred by the Insured (Assured) in order for coverage to be available. Since the Partnership's claim is for the expenses incurred by the Partnership, not Lockwood, the Partnership is not entitled to recover from the interpled fund and the trial court's award was incorrect.

B. The Interpled Proceeds of the Marine Policy Should be Applied First to Pay for Damage to Insured Personal Property, and Only After claims for Insured Personal Property Damage have been Satisfied, Should Any Remaining Policy Proceeds be Paid for Clean Up and/or Debris Removal Expense.

The Policy provided property insurance to Lockwood for the benefit of Lockwood and the owners of the insured personal property who stored their property with

Lockwood in the Building. (See Rec. Ex. Tab 10, pp. 6-25). Debris removal expenses are specifically referred tot only as an extension subject to the policy terms, conditions and limitations, and is clearly not the primary coverage provided. (Appendix 1 pp. 5, 8; Rec. Ex. Tab 10 pp. 10, 19). Furthermore, the policy limits are based on the reported values of stored property in the Building. (Appendix 1 pp. 4-5; Rec. Ex. Tab 10 pp. 20-21). While it is true that the value of goods declared to be present in the Building was woefully less than the actual value of the goods stored, this does not change the fact that the policy limits were intended primarily to compensate for the value of the personal property destroyed. The policy limits are specifically stated to not be enlarged by the language in the Debris Removal Clause. (Appendix 1 pp. 5, 8; Rec. Ex. Tab 10 pp. 10, 19). Since the conditions precedent in the Pollution Endorsement require that the Underwriters have either paid or agreed to pay for direct physical damage to insured personal property, it stands to reason that debris removal coverage is secondary, available only if there is coverage still available after all claims for damage to insured personal property have been paid.

By way of example, if a payment of the policy limits had been made by the Underwriters, the provision in the Debris Removal Clause which states that the policy limits would not be enlarged to provide debris removal coverage would govern and no payment for debris removal would be allowed. The only difference between an actual payment and an agreement to pay for direct loss to insured property in the condition precedent is that in the latter situation, where payment has not yet been made, it permits the insured to proceed with the submission and adjustment of debris removal expenses, but does not change the substantive requirement of a com-

mitment of policy proceeds to cover damage to insured personal property prior to debris removal expenses being recoverable. Thus, in the event of a partial loss, where the damage to insured property is less than total, a portion of the policy limits would be available to cover some or all of the debris removal expense. *See Henry v. American Concept Ins. Co.*, 498 N.W.2d 657, 660 (S.D., 1993).

In the case before this Court, Lockwood reported values significantly below the actual value of the personal property directly related to its business and over which it had care, custody, or control or for which it had contracted to provide insurance. Those goods were the primary object of this property insurance policy. The owners were persons with whom the insurance company could adjust the claims for damage. It was their property described in the "Property Covered" section of the policy. In this case these owners received only a fraction of the value of their destroyed goods. The unkindest part of the trial court's finding was that the trial court gave 12.42% of the already inadequate proceeds to a party clearly not insured under the policy for expenses that should be secondary and not recoverable until all the personal property damage was paid. That result was unfair, inequitable and inconsistent with the policy language.

C. The Evidence Presented to the Trial Court Did Not Contain Any Proof that the Condition Precedent in the Policy, Requiring Notice by the Insured of Intent to Claim for Debris Removal Expense, was Satisfied.

The district court erroneously awarded the Partnership a share of the proceeds of the Policy based on the language in the Pollution Endorsement regarding debris removal and clean up expense. (R. Ex. Tab 4 p. 2208).

The Pollution Endorsement, however, expressly required the Assured, to notify the insurer that it intended to make a claim for such expenses under the endorsement within twelve months of the fire. (Appendix 1 p. 5; Rec. Ex. Tab 10 p. 10). This provision was not addressed by the trial court when it made the award to the Partnership. The Policy named only Lockwood as the Insured. (*See generally* Rec. Ex. Tab 10 pp. 6-25). Other parties who may be entitled to receive policy proceeds are referred to in the Policy as "Loss Payees," (Rec. Ex. Tab 10 pp. 6-7), or "owner" (Appendix 1, p. 6; Rec. Ex. Tab 10 p. 18), never as "Insured." Thus, only notice of intent to claim by Lockwood satisfies the condition precedent.

No evidence of any such notice was presented to the trial court by the Partnership or any other party. (*See generally* Rec.) Thus, the Partnership failed to prove compliance with a condition precedent to the recovery for either debris removal or clean up expenses. A person seeking performance of an insurance contract must prove that all contractual prerequisites have been satisfied. *Harwell v. State Farm Mut. Auto. Ins. Co.*, 876 S.W.2d 494, 498 (Tex. App.—Fort Worth 1994), aff'd., 896 S.W.2d 170 (Tex. 1995). The award of the trial court was erroneous because the Partnership's claim failed to prove its right to recover under the Policy.

D. The Partnership Failed to Prove The Portion of its Claim That Was For Removal of Debris of Insured Property.

The two debris removal provisions of the Policy discussed above cover only the removal of debris covered under the policy. The first provision states, "This policy is extended . . . to cover the Insured's expenses incurred

in the removal of all debris **of the property insured hereunder** . . . ." (Appendix 1 p. 5; Rec. Ex. Tab 10 p. 19) (emphasis added). The second provision contained in the Pollution Endorsement, states, "[I]n the event of direct physical loss or damage **to the property insured hereunder,** this Policy . . . also insures . . . expenses reasonably incurred in removal of debris of the **property insured hereunder** destroyed or damaged from the premises of the Assured; . . . ." (Appendix 1 p. 8; Rec. Ex. Tab 10 p. 10) (emphasis added).

The trial court found that not all of the property destroyed in the warehouse fire was insured by the Policy. In fact it only allowed $2,671,947.95 to be considered as valuation for apportionment purposes notwithstanding the fact that the full value of all the damaged property was $17,572,653.50. The Partnership has claimed the entire cost of debris removal without differentiating between expenses for insured versus uninsured property. (Rec. Ex. Tab 11 pp. 1505-06). The portion of such expense that was incurred for the removal of the debris of property that was not insured under the Policy would not have been covered by the Policy, even if the claim had been submitted by the Assured.

The Partnership's proof fails to establish the portion of expenses related to removal of debris of insured property. In an interpleader action, each party claiming entitlement to the interpled funds has the burden of proof by a preponderance of the evidence to show its entitlement to the funds. *In re The Kelly Group, Inc.*, 159 B.R. 472, 476 (W.D. Va. 1993); *Midland Ins. Co. v. Friedgood,* 577 F.Supp. 1407, 1411 (S.D.N.Y. 1984). The Partnership is therefore not entitled to a share of the interpled fund because it has not carried the burden of proving its claim.

This issue was raised by Kraft in its initial objection to the Magistrate's findings and recommendations. In response to that objection, the Partnership pointed out to the Court that the Pollution Exclusion also provided for clean up costs, which argument was adopted by the trial court without any detailed analysis or opinion. However, both the affidavit of Martin Leibowitz, one of the partners of the Partnership and the affidavit of John Cherry, the debris removal contractor, identified the claimed expenses as debris removal rather than clean up.

Leibowitz - "The costs associated with the removal of this debris were $384,000." (Rec. Ex. Tab 11 p. 1505).

Cherry - "The costs associated with the removal of the debris of the property stored in the warehouse are approximately $384,000, which represents the costs of removing the material, transportation, and disposal." (Rec. Vol. 4 p. 1388).

No proof whatsoever was offered to support a claim for clean up costs, and thus the argument advanced by the Partnership's counsel in response to Kraft's objections is not supported by the evidence offered on behalf of the Partnership.

CONCLUSION AND PRAYER FOR RELIEF

Kraft has shown that the trial court's award to the Partnership was reversible error for four reasons:

1) The Partnership was not the Insured under the policy and only the Insured (Lockwood), if anyone, was entitled to recover clean up and debris removal expenses.
2) The debris removal and clean up expense extension of coverage was secondary to the coverage for damage to insured personal property and should not

have been considered until all claims for damaged personal property were satisfied.

3) There was no evidence in the record to demonstrate compliance with the condition precedent in the policy requiring the Assured to give notice of intent to claim clean up or debris removal expense within 12 months from the date of loss.

4) The evidence offered by the Partnership to support its claim for "clean up" expenses demonstrated that the expenses incurred were for debris removal of (1) [sic] Not withstanding the Appellee's brief and the court's opinion which referred to the expenses as "clean up expenses," the affidavits offered in evidence identify the expenses as being incurred for "debris removal." Furthermore, the debris removal expenses were for all the damaged personal property in the Building with no segregation between costs to remove insured versus uninsured personal property

For all of the foregoing reasons appellant would show that the award of the trial court to the Partnership was in error.

As the court may be aware from the docket sheet entries, Appellant filed a timely Motion for New Trial and for Stay of Execution of Judgment. During the pendency of that motion, and in violation of the Federal Rules the District Court Clerk's office in Houston errneously mailed out checks disbursing the interpled funds. However, this Court continues to have jurisdiction over the parties to whom the funds were disbursed.

The final judgment states only the percentage of the interpled funds to be received by each party without stating a dollar amount. Kraft believes that the Partnership received approximately $158,430.00 of the interpled

funds, plus accrued interest to the date of distribution in the amount of $15,193.00. Appellant requests that this Court reverse the trial court's ruling with respect to the award of funds to the Partnership, order that the Partnership take nothing, order the Partnership to return the awarded funds to the registry of the Court, together with accrued interest from March 15, 1996, the date Kraft believes the court distributed such funds, and order the trial court to distribute the returned funds to the other claimants who received an award of funds. Such a distribution should be made pro-rata on the basis of the recalculated percentage of recovery outlined in Appendix 2 attached to this brief.

If this Court should determine that parties who received a portion of the interpled funds but did not appeal the trial court's ruling are not entitled to an increased recovery, Kraft alternatively would ask the Court to reverse the holding of the trial court and order the Partnership to pay into the registry of the trial court in Houston for the benefit of Kraft the amount of $64,640.17 plus accrued interest from March 15, 1996, the date funds were disbursed by the Court. That amount represents Kraft's share of the funds awarded to the Partnership.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Brief For Appellants Maxwell House Coffee Company and Kraft General Foods, Inc. have been sent by United States certified mail, postage prepaid, return receipt requested, to the following counsel of record on this 12th day of August, 1996.

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[Appendix originally attached to Brief
Omitted In Printing]